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# **A DARK SIDE OF VIRTUE: THE INTER-AMERICAN COURT AND REPARATIONS FOR INDIGENOUS PEOPLES**

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## INTRODUCTION

Indigenous peoples have endured grave injustices throughout history.<sup>1</sup> Even after international affirmations of indigenous rights, massacres, forced removal, and persecution have continued.<sup>2</sup> Of particular concern in recent years, extractive projects and other commercial developments have threatened their lives and livelihood.<sup>3</sup>

The Inter-American Court of Human Rights has now developed a

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1. See, e.g., S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 3–34 (2d ed. 2004) (describing European colonization as leading to indigenous “suffering and turmoil on a massive scale”); KAREN ENGLE, *THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT: RIGHTS, CULTURE, STRATEGY* 1–2 (2010) (referring to “centuries of colonialism, massive acts of violence” and “development projects meant to remove or assimilate” indigenous peoples); PATRICK THORNBERRY, *INDIGENOUS PEOPLES AND HUMAN RIGHTS* 18–20 (2002) (outlining “multiple forms of cultural and social trauma”).

2. For example, many of the severe human rights violations described in Part II, *infra*, occurred after 1989, the year when the International Labour Organisation adopted the Indigenous and Tribal Peoples Convention. Int’l Labour Org., *Indigenous and Tribal Peoples Convention*, June 27, 1989, No. 169, 1650 U.N.T.S. 383, 384 [hereinafter ILO Convention].

3. See, e.g., U.N. Permanent Forum on Indigenous Issues, International Expert Group Meeting on Extractive Industries, Indigenous Peoples’ Rights and Corporate Social Responsibility, Manila, Phil., Mar. 27–29, 2009, *Report of the International Expert Group Meeting on Extractive Industries, Indigenous Peoples’ Rights and Corporate Social Responsibility*, ¶ 14, U.N. Doc. E/C.19/2009/CRP, at 8 (May 4, 2009) (highlighting problems for indigenous peoples around the world); AMNESTY INT’L, *SACRIFICING RIGHTS IN THE NAME OF DEVELOPMENT: INDIGENOUS PEOPLES UNDER THREAT IN THE AMERICAS* 3 (2011) (noting that, around the globe, states frequently pass laws and undertake development projects without regard for the affected indigenous peoples); Sara Miller Llana & Sara Shahriari, *Bolivian Indigenous Struggle to be Heard—by Indigenous President Morales*, THE CHRISTIAN SCI. MONITOR, Oct. 5, 2011, <http://www.csmonitor.com/World/Americas/2011/1005/Bolivian-indigenous-struggle-to-be-heard-by-indigenous-President-Morales> (stating that there is increasing turmoil across Latin America as indigenous peoples demand greater participation in decisions that affect their territories); John Collins Rudolf, *Isolated Amazon Tribes Threatened by Logging, Groups Say*, N.Y. TIMES (Feb. 3, 2011, 8:21 AM), <http://green.blogs.nytimes.com/2011/02/03/isolated-amazon-tribes-threatened-by-logging-groups-say> (reporting on the potential extinction of an isolated tribe due to illegal logging).

significant jurisprudence on these pervasive abuses against indigenous peoples. This case law is far more extensive than that of the other two regional human rights tribunals, the European Court of Human Rights,<sup>4</sup> and the African Court on Human and Peoples' Rights.<sup>5</sup> Also, unlike the various United Nations institutions that promote indigenous rights, the Inter-American Court issues binding and detailed judgments. As a result, the Court has become a world leader in the adjudication and redress of indigenous claims, influencing authorities across the globe. For this reason, this first close and critical examination of the Court's reparations for indigenous peoples is vital.

With respect to non-monetary remedies and equitable relief, the Court has ordered the restitution of communal lands and other powerful measures, such as legislative reform, health care programs, cultural promotion initiatives, and public apologies. Yet the Court's monetary reparations frequently disappoint. Examples include token sums ordered for plundered ancestral resources and a neglect of individualized compensation. In *Saramaka People v. Suriname*, the Court granted only \$75,000 to the Saramaka community in compensation for timber valued in the millions.<sup>6</sup> Market value was ignored by the Court, despite the petitioners' requests, submitted evidence, and international legal standards.<sup>7</sup> Nevertheless, only a few years later, the Court ordered the payment of nearly \$19 million for a state's expropriation of private land.<sup>8</sup>

When not enforced with sufficient remedies, rights are diminished or even disregarded entirely.<sup>9</sup> By undercompensating indigenous petitioners

4. The European Court of Human Rights has infrequently considered cases involving indigenous communities. See EUR. CT. H.R., CULTURAL RIGHTS IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS 19–21 (2011), available at <http://www.echr.coe.int> (referring only to a limited number of cases); Timo Koivurova, *Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects*, 18 INT'L J. ON MINORITY & GROUP RTS. 1 (2011) (“[T]here have been no landmark cases decided by the European Court of Human Rights . . . in favour of indigenous peoples”).

5. The African Court on Human and Peoples' Rights is only beginning to address these issues. In 2013, the African Court issued an important order for provisional measures to protect an indigenous community that faced eviction from its traditional lands. Order of Provisional Measures, African Commission on Human and Peoples' Rights v. Kenya (2013), available at <http://www.african-court.org/en/index.php/judgments/orders>.

6. *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 199 (Nov. 28, 2007).

7. *Id.* ¶ 192.

8. *Salvador Chiriboga v. Ecuador*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 222, ¶ 84 (Mar. 3, 2011).

9. See, e.g., LOUIS HENKIN, THE AGE OF RIGHTS 3 (1990); Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 685–86 (2006) (“[A] right without any remedies would possess dramatically less value than a right

in these ways, the Court fails to recognize them as full-fledged rights bearers. Fully entitled to collective *and* individual rights, they accordingly require appropriate remedies on both communal and individual levels. The Court's crystallizing approach towards indigenous peoples demands prompt reform. This critique is urgent because indigenous cases continue to flow to the Court, and its criteria are increasingly adopted by UN authorities, regional human rights institutions, and national courts.

The Article proceeds as follows: Part I generally considers remedies in international law, and emphasizes the distinctive and evolving reparations standards for indigenous peoples. Part II examines all of the Inter-American Court's reparations judgments for indigenous peoples. The Court's cases concern single victims and whole communities; several community cases feature both individual and collective claims. Numbering nearly twenty in total, the judgments involve violations of the rights to life, communal property, personal integrity, equality, and political participation, among others. The section reviews nearly all of the remedies ordered by the Court, and highlights aspects that are particularly innovative or controversial.

Part III closely evaluates the Court's remedial approach in the indigenous cases. To assess the judgments, this Part considers the following basic factors: 1) whether the reparations correlate with the kind and degree of harm proven before the Court; 2) whether the Court attends to the complex reality of indigenous petitioners; and 3) whether its orders have avoided excessive ambiguity, which allows states to evade their obligations.

Restorative justice methodology is proposed as a means for the Court to overcome these common challenges of remedial design. Faced with limitations and difficult choices, tribunals must adopt a victim-centered approach and "empower victims to define the restoration that matters to them."<sup>10</sup> Placing victims at the center of the process will immerse the Court in their reality, and tailor remedies more precisely to violations. While victims' demands cannot always be met, their priorities must be understood—and then channeled into reparations that reasonably connect to the proven violations.

Part III then considers occasional deficiencies in the Court's non-monetary remedies and recommends specific refinements. Primarily, it

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that courts will enforce with the full complement of normally available remedies. The more extensive and potent the enforcement mechanisms, the more valuable a right becomes."); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 887 (1999) ("[R]ights can be effectively enlarged, abridged, or eviscerated by expanding, contracting, or eliminating remedies.").

10. JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION* 46 (2002).

encourages the Court to adopt more robust requirements for victim participation in the design and implementation of reparations. Overall, however, the Court's pioneering approach in this area is applauded. With its non-monetary remedies, the Court has increasingly focused upon the reality of indigenous peoples, and has generally responded to their preferences and needs for restoration.

Next, Part III turns to the Court's incongruous monetary reparations. Here, the Court frequently disregards the abovementioned parameters for remedial design. First, the Court's compensation orders often do not correlate with the kind or degree of violation. To illustrate, an indigenous petitioner may show personalized harm, request individualized compensation, but only benefit from a collective remedy. Or a community may prove substantial economic damages, request market value compensation, and only receive a trifling sum in return. Second, at times the Court does not sufficiently account for the reality of indigenous petitioners, such as the difficulties they face in documenting environmental and cultural harm.

To conclude, Part IV urges the Court to commit to a victim-centered approach for monetary damages, as it generally has done for non-monetary remedies. In certain instances, it has proven reluctant to order justified cash compensation for indigenous individuals and communities, or even to closely evaluate their claims. If the Court does not reasonably respond to the way victims want to be restored, it will not adequately redress them. As a result, the Court will betray its mandate as a human rights tribunal and undermine the individual and collective rights of indigenous peoples.

## I. REMEDIES IN INTERNATIONAL LAW FOR HUMAN RIGHTS VIOLATIONS

### A. Overview

Numerous global and regional human rights agreements set out the right to a remedy.<sup>11</sup> The concept of remedy includes substantive and procedural elements, and both are universally established.<sup>12</sup> The procedural

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11. See, e.g., American Convention on Human Rights art. 25, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention]; International Covenant on Civil and Political Rights art. 2(3), Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 (*adopted* Dec. 10, 1966) [hereinafter CAT]; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 13, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention].

12. DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 7, 114 (2d ed. 2005).

element refers to a victim's access to judicial, administrative, or other appropriate authorities, so that the claim of a rights violation may be fairly heard and decided. The substantive element constitutes the result of those proceedings—that is, the redress granted the successful claimant.

The main international and regional human rights treaties require an “effective” remedy or recourse.<sup>13</sup> However, these instruments do not offer specific guidance as to how states should repair violations.<sup>14</sup> Without many explicit parameters, the international bodies formulating remedies for victims of human rights abuse initially turned to principles of state responsibility.<sup>15</sup> The International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles) enumerate the prevailing rules on the subject.<sup>16</sup> ILC Articles 30 (Cessation and non-repetition) and 31 (Reparation) provide, in part, that the state responsible for an internationally wrongful act is under an obligation to i) cease the act, if it is continuing, ii) offer appropriate assurances and guarantees of non-repetition, if circumstances so require, and iii) make full reparation for the material and moral injuries caused by the act.<sup>17</sup>

The commentary accompanying Article 31 explains that the state's duty “to make full reparation for the injury” derives from the *Factory at Chorzów* case of the Permanent Court of International Justice.<sup>18</sup> In that landmark decision, the Court held that “reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”<sup>19</sup> Numerous international tribunals have accepted this

13. See, e.g., American Convention, *supra* note 11, art. 25; ICCPR, *supra* note 11, art. 2(3); European Convention, *supra* note 11, art. 13. An exception is the African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217.

14. The European Convention, for example, simply provides for “just satisfaction.” European Convention, *supra* note 11, art. 41. On the other hand, the American Convention on Human Rights offers more instruction for the Inter-American Court. American Convention, *supra* note 11, art. 63(1). See discussion *infra* Part II.

15. See SHELTON, *supra* note 12, at 50 (explaining that “[p]rior to the development of international human rights law” the law of state responsibility provided useful parameters for remedies).

16. Rep. of the Int'l Law Comm'n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001), available at [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) [hereinafter ILC Articles].

17. *Id.* arts. 30, 31. Separating cessation and non-repetition from the concept of reparation represents a shift from earlier approaches, which considered both measures to be forms of reparation. See SHELTON, *supra* note 12, at 87. Now, however, cessation and non-repetition are understood as inherent “rule of law” obligations of the responsible state, independent from the notion of reparation. *Id.*

18. ILC Articles, *supra* note 16, art. 31 commentary.

19. *Factory at Chorzów* (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13, 1928).

principle of *restitutio in integrum*.<sup>20</sup>

Reparation is further developed in ILC Article 34, which states, “[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination.”<sup>21</sup> Since full restitution, a return to the *status quo ante*, is impossible after many forms of rights violations, satisfaction must take a greater role in human rights law.<sup>22</sup> Article 37(2) provides that “[s]atisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.”<sup>23</sup>

Cessation, non-repetition, restitution, compensation, and satisfaction are all key elements of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles).<sup>24</sup> The United Nations General Assembly adopted the Basic Principles in 2005.<sup>25</sup> According to the Preamble, the Basic Principles “do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations . . . .”<sup>26</sup>

20. See, e.g., *Avena (Mex. v. U.S.)*, 2004 I.C.J. 12, 25 (Mar. 31, 2004); *Barberà v. Spain*, 285 Eur. Ct. H.R. (ser. A) 50, 57 (1994); *Moiwana Cmty. v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 170 (June 15, 2005).

21. ILC Articles, *supra* note 16, art. 34. Restitution is the primary manner of remedy in interstate law, and the ILC considers satisfaction to be an exceptional measure, to be employed when restitution and compensation are insufficient. *Id.*, art. 35 commentary, art. 37 commentary.

22. See SHELTON, *supra* note 12, at 103, 150; Sergio García-Ramírez, *La Jurisprudencia de la Corte Interamericana de Derechos Humanos en Materia de Reparaciones*, in LA CORTE INTERAMERICANA DE DERECHOS HUMANOS: UN CUARTO DE SIGLO 1, 40 (2005), available at <http://www.corteidh.or.cr/docs/libros/cuarto%20de%20siglo.pdf>.

23. ILC Articles, *supra* note 16, art. 37(2).

24. G.A. Res. 60/147, U.N. Doc A/RES/60/147, at 1 (Mar. 21, 2006) [hereinafter Basic Principles].

25. Theodoor van Boven was originally appointed to examine “the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms” and to develop basic principles and guidelines on remedies. See Special Rapporteur on Rights of Victims of Gross Violations of Human Rights and Fundamental Freedoms, *Final Rep. on Rights of Victims of Gross Violations of Human Rights and Fund. Freedoms*, Comm’n on Human Rights, U.N. Doc E/CN.4/2000/62 (Jan. 18, 2000) (by Cherif Bassiouni). Van Boven submitted draft principles in 1993, which were subsequently revised in 1996 and again in 1997. See *id.* Cherif Bassiouni took up the mandate starting in 1998; however, not until 2005 were the Basic Principles adopted by the Commission on Human Rights, the Economic and Social Council, and, finally, the General Assembly. See Basic Principles, *supra* note 24.

26. Basic Principles, *supra* note 24, at 3. The Basic Principles evade the contentious matter of defining “gross” violations of international human rights law and “serious” violations of international humanitarian law. A report of the U.N. High Commissioner for Human Rights concerning the Basic Principles noted that “shall” was only used in reference to a “binding international norm,” while “should” is employed in cases of “less mandatory” principles. U.N. E.S.C.O.R., *Report of the*



Paragraph 18 of the Basic Principles establishes:

[victims] should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, . . . which include[s] the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>27</sup>

According to the Principles, “restitution” means restoring a victim to his or her original situation, such as returning confiscated property, whereas “rehabilitation” includes “medical and psychological care as well as legal and social services.”<sup>28</sup> “Satisfaction” comprises several possible measures including apologies, “full and public disclosure of the truth,” victim commemoration, or judicial and administrative sanctions.<sup>29</sup> “Guarantees of non-repetition” are equally varied, including legal reform and human rights training programs.<sup>30</sup>

The Basic Principles’ major elements were later incorporated into U.N. “hard law.” To illustrate, the International Convention for the Protection of All Persons from Enforced Disappearance provides for compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition.<sup>31</sup> The Convention on the Rights of Persons with Disabilities calls for “all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities” in the event of exploitation, violence, or abuse.<sup>32</sup> Thematic treaties of the Americas, Africa, and Europe now mandate similarly comprehensive redress for rights violations.<sup>33</sup>

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*Consultative Meeting on the Draft Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law*, ¶ 8, U.N. Doc. E/CN.4/2003/63 (Dec. 27, 2002). In this regard, Dinah Shelton has criticized the Basic Principles as overly conservative. SHELTON, *supra* note 12, at 147 n.211.

27. Basic Principles, *supra* note 24, at ¶ 18.

28. *Id.* ¶¶ 19, 21.

29. *Id.* ¶ 22. Note that the Basic Principles include measures “aimed at the cessation of continuing violations” under the heading of satisfaction. This disregards the ILC’s important separation of cessation and non-repetition from the concept of reparation. That is, placing cessation under a category of reparation implies that, in the absence of a victim, the state has no obligation to desist from illegal conduct. See SHELTON, *supra* note 12, at 149.

30. Basic Principles, *supra* note 24, at ¶ 23.

31. International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, U.N. Doc. A/Res/61/177, art. 24 (Jan. 12, 2007).

32. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/Res/61/106, art. 16(4) (Jan. 24, 2007).

33. See, e.g., Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women art. VII, 33 I.L.M. 1534, 1536 (1994); Inter-American Convention Against All Forms of Discrimination and Intolerance (A-69) (June 5, 2013), available at [http://www.oas.org/en/sla/dil/docs/inter\\_american\\_treaties\\_A-69\\_discrimination\\_intolerance.pdf](http://www.oas.org/en/sla/dil/docs/inter_american_treaties_A-69_discrimination_intolerance.pdf); Council of Europe Convention on Action against Trafficking in Human Beings art. XII, May 16, 2005, COUNCIL OF

Even international criminal law has supported broad remedies for victims. The groundbreaking Rome Statute of the International Criminal Court requires the establishment of “principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation,” directs the States Parties to establish a trust fund for victims, and orders the Court “to protect the safety, physical and psychological well-being, dignity and privacy of victims.”<sup>34</sup> Subsequently, the U.N.-backed Extraordinary Chambers in the Courts of Cambodia was granted the competence to order “collective and moral reparations” to civil parties before it.<sup>35</sup>

International human rights tribunals have both drawn from, and further developed, these advances in global law. The African Court on Human and Peoples’ Rights recently ordered legislative and other broad measures in its leading judgment against Tanzania.<sup>36</sup> The U.N. Human Rights Committee, established by the International Covenant on Civil and Political Rights, has promoted multidimensional redress through commentary on the Covenant and various recommendations to states.<sup>37</sup>

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EUROPE, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/197.htm>; Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence art. V, Nov. 5, 2011, COUNCIL OF EUROPE, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/210.htm>; Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa art. IV, July 11, 2003, AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, <http://www.achpr.org/instruments/women-protocol/> (last visited Mar. 13, 2015).

34. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3, arts. 68(1), 75(2), 79 [hereinafter Rome Statute]. Furthermore, Article 68 provides that participation of victims will be allowed at all stages of the proceedings “determined to be appropriate by the Court.” *Id.* art. 68. For extensive treatment of the Rome Statute and the ICC, see BETH VAN SCHACK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT: CASES AND MATERIALS (2d ed. 2010).

35. E.C.C.C., Internal Rules [Rev.9], Rule 23 *quinquies* (Jan. 16, 2015). In 2010, the ECCC issued its first judgment on reparations. The Civil Parties to the case requested apologies, medical care, educational programs, commemorations, and the “inclusion of the names of the Civil Parties in Case 001 in the final judgment, along with a description of their connection to [the prison camp],” among other measures. Case File 001/18-07-2007/ECCC/TC, Trial Chamber, Extraordinary Chambers in the Courts of Cambodia, at ¶ 652 (July 26, 2010). In response, the Trial Chamber merely recognized the names of the victims in the judgment, and ordered a compilation of the perpetrator’s “statements of apology.” *Id.* ¶ 683. These minimal reparations were affirmed on appeal. Case File 001/18-07-2007/ECCC/SC, Supreme Court Chamber, Extraordinary Chambers in the Courts of Cambodia, Summary of Appeal Judgment (Feb. 3, 2012).

36. *Tanganyika Law Society v. Tanzania*, African Court on Human and Peoples’ Rights, App. No. 009/2011, ¶ 126 (2013).

37. See, e.g., U.N. H.R., Int’l. Covenant on Civil & Political Rights, General Comment No. 31 [80], U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 16 (Mar. 29, 2004) [hereinafter General Comment No. 31]. In response to individual petitions alleging human rights violations, the Committee has specifically requested that states implement the following measures: compensation, public investigation and prosecution, legal reform, restitution of liberty, employment or property, and medical care. See SHELTON, *supra* note 12, at 184–185.

The Committee has stated that reparation to victims entails compensation, restitution, rehabilitation, and “measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.”<sup>38</sup>

For its part, the Inter-American Court of Human Rights stands as the only international tribunal with binding jurisdiction that has ordered all such remedies. The depth and breadth of its reparations jurisprudence are unparalleled. Often in potent combinations, the Court has ordered wide-ranging measures such as monetary compensation, restitution, cessation, medical and psychological rehabilitation, apologies, memorials, legislative reform, and training programs for state officials, among others.<sup>39</sup> This approach sharply contrasts with that of the world’s oldest human rights tribunal, the European Court of Human Rights. The European Court has historically favored only monetary compensation and declaratory relief, although exceptions to its constrained model have appeared during recent years.<sup>40</sup>

## B. Remedies for Indigenous Peoples in International Law

Indigenous rights in international law have developed significantly in the last three decades.<sup>41</sup> Indigenous advocates have expanded classic international human rights norms to “express [indigenous peoples’] specific aspirations and self-understandings.”<sup>42</sup> The expansion of indigenous rights

38. General Comment No. 31, *supra* note 37, ¶ 16.

39. See Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT’L L. 351, 365–387 [hereinafter Antkowiak, *Remedial Approaches*] (analyzing the Court’s varied remedies in detail).

40. See, e.g., DAVID HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 857–858 (2d ed. 2009) (summarizing the European Court’s limited reparations). More recently, the European Court has turned to new approaches to address its overwhelming caseload. For example, the “pilot judgment” procedure has led the European Tribunal to order national legal and administrative reform. See, e.g., *Hutten-Czapska v. Poland*, 2006-VIII Eur. Ct. H.R. 57; *Broniowski v. Poland*, 2004-V Eur. Ct. H.R. 1.

41. See, e.g., ANAYA, *supra* note 1; INTERNATIONAL LAW ASSOCIATION, *THE HAGUE CONFERENCE ON THE RIGHTS OF INDIGENOUS PEOPLES, INTERIM REPORT 1–6* (2010), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> [hereinafter ILA Report]; WILL KYMLICKA, *MULTICULTURAL ODYSSEYS: NAVIGATING THE NEW INTERNATIONAL POLITICS OF DIVERSITY* 3–7 (2007); THORNBERRY, *supra* note 1; Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 100–10 (1999).

42. Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples’ Claims in International and Comparative Law*, 34 N.Y.U. J. INT’L L. & POL. 189, 237–38 (2001) (citing, among others, provisions on self-government and “the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources”); see also Lillian Aponte Miranda,

has led to a corresponding amplification of remedies in global law.

In 1989, the International Labour Organisation took a major step by adopting the Indigenous and Tribal Peoples Convention (ILO Convention).<sup>43</sup> In 2007, following over twenty-five years of difficult negotiations, the United Nations introduced its Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>44</sup> Both instruments contain provisions on remedies for indigenous peoples.

Article 15 of the ILO Convention refers to a common situation where states retain the “ownership of mineral or sub-surface resources or rights to other resources” corresponding to indigenous lands.<sup>45</sup> Before exploring or extracting such resources, the Convention requires states to “consult these peoples.”<sup>46</sup> The concerned communities also “shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages.”<sup>47</sup>

Article 16 addresses another frequent scenario: when indigenous peoples are forced from their lands. It provides, in part:

Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to

*Indigenous Peoples as International Lawmakers*, 32 U. PA. J. INT’L L. 203, 207 ([I]ndigenous peoples have played a significant role in changing the legal landscape of human rights . . .”).

43. ILO Convention, *supra* note 2. The ILO Convention has only been ratified by twenty-two states worldwide since 1989. Most are from Latin America. *See id.* The Convention is certainly not without its critics. *See, e.g.*, Sharon Venne, *The New Language of Assimilation: A Brief Analysis of ILO Convention No. 169*, WITHOUT PREJUDICE, 1989, at 53, 53 (arguing that the ILO Convention No. 169 is assimilationist and “far more destructive than its predecessor,” Convention No. 107).

44. *See generally* U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295/Annex (Sept. 13, 2007) [hereinafter UNDRIP] (UNDRIP was forced to accept various revisions and compromises); *see also* Karen Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, 22 EUR. J. INT’L L. 141, 144–51 (2011); Willem van Genugten, *Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems*, 104 AM. J. INT’L L. 29, 34 (2010).

45. ILO Convention, *supra* note 2, art. 15. Even when indigenous communities possess title to their territories, the law often establishes state ownership over water and subsurface resources. *See, e.g.*, Inter-Am. Comm’n on H.R., *Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, ¶ 180, Doc. No. 56/09, OEA/Ser.L/V/II (2009), available at <http://www.oas.org/en/iachr/indigenous/docs/pdf/AncestralLands.pdf> [hereinafter Inter-Am. Comm’n Thematic Rep.] (describing this situation in the Americas); Dinah Shelton, *Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon*, 105 AM. J. INT’L L. 60, 81 (2011) (“Subsurface mineral and water rights belong to the state in many countries, and even conveying title to indigenous peoples will not be sufficient to ensure that they are properly consulted and able to determine the nature and scope of projects affecting their lands.”).

46. The text continues: “with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.” ILO Convention, *supra* note 2, art. 15.

47. *Id.*

exist . . . When such return is not possible . . . these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development.<sup>48</sup>

If communities prefer “compensation in money or in kind,” they may exercise that option.<sup>49</sup> The Article concludes by emphasizing, “[p]ersons thus relocated shall be fully compensated for any resulting loss or injury.”<sup>50</sup>

The UNDRIP, a non-binding instrument, offers more content on indigenous remedies. Still, efforts for more specific terms frequently derailed negotiations; as a result, details were not often achieved in the text.<sup>51</sup> The central provision, Article 40, establishes:

Indigenous peoples have the right . . . to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.<sup>52</sup>

The UNDRIP generally calls for “effective mechanisms for prevention of, and redress for” actions that: deprive indigenous communities of their “integrity as distinct peoples, or of their cultural values or ethnic identities”; dispossess them of their territories or resources; force them to move, assimilate, or integrate; or “promote or incite racial or ethnic discrimination” against them.<sup>53</sup>

As for “cultural, intellectual, religious and spiritual property taken without [the] free, prior and informed consent” of indigenous communities, states shall also provide redress, “which may include restitution.”<sup>54</sup> Similarly, states “shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession.”<sup>55</sup> Both provisions require that redress procedures are developed “in conjunction with indigenous peoples.”<sup>56</sup>

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48. ILO Convention, *supra* note 2, art. 16.

49. *Id.* art. 16(4).

50. *Id.* art. 16(5).

51. See CLAIRE CHARTERS, *Reparations for Indigenous Peoples: Global International Instruments and Institutions*, in REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 163, 170–71 (Frederico Lenzerini ed., 2008) (noting that the redress provisions triggered some of the most contentious debates during the UNDRIP drafting process; some essential victories were obtained, however, such as replacing a “right to pursue redress” with the unencumbered right to redress).

52. UNDRIP, *supra* note 44, art. 40.

53. See *id.* arts. 8, 40.

54. *Id.* art. 11(2).

55. *Id.* art. 12(2).

56. *Id.* arts. 11(2), 12(2).

With respect to land remedies in particular, the UNDRIP elaborates to a greater extent than the ILO Convention. Forced relocation cannot occur “without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.”<sup>57</sup> When territories or resources have been used or damaged without their consent, “[i]ndigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation.”<sup>58</sup> Such compensation “shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.”<sup>59</sup> The UNDRIP takes a major step forward by not requiring that indigenous communities currently possess their lands to receive redress.<sup>60</sup> On the other hand, when restitution is not possible, the instrument allows for a murky alternative: “other appropriate redress.”<sup>61</sup>

Human rights authorities such as the United Nations treaty bodies and special procedures have begun to fill in the lacuna left by the ILO Convention and the UNDRIP. The U.N. Special Rapporteur on indigenous rights has urged extensive remedies for indigenous peoples, addressing “not only the impact on their environment or productive capacity, but also the impact on the social, cultural and spiritual aspects of their life.”<sup>62</sup> The ILO Committee of Experts, charged with monitoring the ILO Convention, seeks to provide protections for indigenous peoples by reviewing state reports and complaints.<sup>63</sup> However, the Committee’s recommendations to states are often oblique, and it avoids resolving individual land disputes and issues of valuation.<sup>64</sup>

57. *Id.* art. 10.

58. *Id.* art. 28(1).

59. *Id.* art. 28(2).

60. CHARTERS, *supra* note 51, at 171.

61. UNDRIP, *supra* note 44, art. 28(2).

62. See U.N. H.R. Council, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, ¶ 75, U.N. Doc. A/HRC/15/37 (July 19, 2010) (by James Anaya) (referring to the various harms of extractive industries).

63. The full title of the Committee is the “ILO Committee of Experts on the Application of Conventions and Recommendations.”

64. See, e.g., Charters, *supra* note 51, at 175 (noting that the ILO Committee of Experts “couches its recommendations in muted and indirect terms”). A recent sampling of decisions shows that the Committee primarily invites State Parties to submit information on the implementation of points relevant to the ILO Convention. Still, through its information requests, the Committee’s support can be perceived for important principles such as “fair compensation” for losses sustained by indigenous communities. E.g., Committee of Experts on the Application of Conventions and Recommendations, *Observation on the application of a Convention, C111 Brazil* (2012) available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3057584](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3057584); Committee of Experts on the Application of Conventions and Recommendations, *Observation on the application of a*

The U.N. Human Rights Committee (HRC) has been more forthcoming on the subject of indigenous reparations. While its views on individual petitions have been restrained,<sup>65</sup> the HRC's concluding observations on state reports are quite demanding. For example, when considering Guatemala's National Reparations Program, which attends to many indigenous communities, the HRC emphasized the importance of "comprehensive care with cultural and linguistic relevance, with a focus on psychosocial support, restoration of dignity and recovery of historical memory."<sup>66</sup> To address the discrimination of indigenous peoples in Guatemala, the HRC recommended legislative and policy reform, as well as education campaigns.<sup>67</sup> With regard to access to justice barriers in particular, the Committee called for enhanced interpretation services and training programs for legal officials.<sup>68</sup> Moreover, the Committee noted that Guatemala should "carry out prior and informed consultations with indigenous peoples for all decisions relating to projects that affect their rights."<sup>69</sup>

Among the U.N. treaty bodies,<sup>70</sup> the Committee on the Elimination of Racial Discrimination (CERD Committee), which monitors compliance

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*Convention, C081 Colombia* (2012) available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3082088](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3082088).

65. To illustrate, in 2009 the U.N. Human Rights Committee found that Peru's construction of wells hindered the petitioner's "traditional economic activity." See *Poma-Poma v. Peru*, U.N. H.R. Comm., ¶ 7.7, U.N. Doc. CCPR/C/95/D/1457/2006 (April 9, 2009). It concluded that the State "substantively compromised the way of life and culture of the author," in violation of Article 27 of the ICCPR. *Id.* As for reparations, however, the HRC merely indicated the following: "the State party is required to provide the author an effective remedy and reparation measures that are commensurate with the harm sustained." *Id.* ¶ 9. In addition, it stated that Peru "has an obligation to take the necessary measures to ensure that similar violations do not occur in future." *Id.*

66. See U.N. H.R. Comm., *Concluding Observations of the H.R. Comm., Guatemala*, ¶ 7, U.N. Doc. CCPR/C/GTM/CO/3 (Apr. 19, 2012).

67. *Id.* ¶¶ 8–10.

68. *Id.* ¶ 26.

69. *Id.* ¶ 27.

70. Other U.N. treaty bodies have issued recommendations for indigenous reparations. For recent examples, see, e.g., Comm. on the Elimination of Discrimination Against Women [CEDAW], *Views of the Comm. on the Elimination of Discrimination against Women under Art. 7, Para. 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Can., U.N. Doc. CEDAW/C/51/D/19/2008 (Apr. 26, 2012) (the Committee recommended both society-wide and individual reparations, but monetary damages not specified.); Comm. on Economic, Social and Cultural Rights [CESCR], *Concluding Observations of the Comm. on the Third Periodic Report of Ecuador*, ¶ 9, U.N. Doc. E/C.12/EQU/CO/3 (Nov. 30, 2012) (the Committee urged Ecuador to implement "safeguard measures for cultural integrity and redress."); Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Art. 44 of the Convention of the Rights of the Child*, Myanmar/Burma, ¶ 21, U.N. Doc. CRC/C/MMR/CO/3-4 (Mar. 14, 2012) (the Committee criticized "the absence of a legislative framework regulating the prevention of, protection against and reparation of the adverse impacts of activities by private and State owned companies.").

with the International Convention on the Elimination of All Forms of Racial Discrimination, has attained distinction for its varied and meticulous recommendations for redress.<sup>71</sup> In recent observations on Bolivia, for example, the Committee recommended specific legislative reforms, education programs to eradicate discrimination, as well as swift investigation and prosecution of various “acts of racist violence” against members of indigenous communities.<sup>72</sup>

In a report on Rwanda, the CERD Committee urged the State to complete numerous actions on behalf of the Batwa people, whose territory had been “expropriated without prior consultation.”<sup>73</sup> It called on Rwanda to “take all necessary steps, in consultation with and with the agreement of the Batwa, to offer them adequate land . . . so that they can retain their traditional lifestyle and engage in income-generating activities.”<sup>74</sup> Among other measures, the Committee requested the State to ensure the community’s access to health care, education, and housing.<sup>75</sup>

At the regional level, the Inter-American Commission on Human Rights has generally followed the Inter-American Court’s approach to reparations for indigenous peoples.<sup>76</sup> The next sections review and evaluate this approach in detail. For its part, the African Commission on Human Rights has shown inconsistency in its reparative model, varying between “the total absence of remedies” and specific recommendations.<sup>77</sup> For this reason, its 2010 decision on the Endorois community in Kenya is

71. See FOREST PEOPLES PROGRAMME, INDIGENOUS PEOPLES AND UNITED NATIONS HUMAN RIGHTS BODIES: A COMPILATION OF UN TREATY BODY JURISPRUDENCE, THE RECOMMENDATIONS OF THE HUMAN RIGHTS COUNCIL AND ITS SPECIAL PROCEDURES, AND THE ADVICE OF THE EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES, preface, vol. V, (Fergus MacKay ed., 2011–12), available at <http://www.forestpeoples.org/sites/fpp/files/publication/2013/01/cos-2011-12.pdf> (“[i]n the period 2011-12, the [CERD Committee] continued to adopt detailed and responsive observations and recommendations, including under its follow up and early warning and urgent action procedures.”); CHARTERS, *supra* note 51, at 182 (observing that the CERD Committee’s greater specificity on indigenous reparations “distinguishes” it from other UN bodies).

72. See Comm. on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Art. 9 of the Convention*, Bol., ¶¶ 12–17, U.N. Doc. CERD/C/BOL/CO/17-20 (Apr. 8, 2011).

73. Comm. on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Art. 9 of the Convention*, Rwanda, ¶ 17, U.N. Doc. CERD/C/RWA/CO/13-17 (Apr. 19, 2011).

74. *Id.*

75. *Id.* ¶ 16.

76. See Inter-Am. Comm’n Thematic Rep., *supra* note 45, ¶¶ 335–94 (citing extensively to the Inter-American Court while examining Inter-American standards on indigenous reparations and access to justice). The Court’s interpretations of the American Convention are authoritative for the Commission.

77. See Frans Viljoen & Lorette Louw, *State Compliance with the Recommendations of the African Commission on Human and Peoples’ Rights, 1994–2004*, 101 AM. J. INT’L L. 1, 16 (2007).



noteworthy.<sup>78</sup> There, the African Commission found that the State, in creating a game reserve, “unlawfully evicted the Endorois from their ancestral land and destroyed their possessions.”<sup>79</sup> Among other measures, the Commission recommended that Kenya return ancestral lands, recognize property rights, ensure access to religious and cultural sites, “pay adequate compensation to the community for all the loss suffered,” “pay royalties to the Endorois from existing economic activities,” and “ensure that they benefit from employment possibilities within the Reserve.”<sup>80</sup>

While the above institutions have made important contributions to the promotion of indigenous rights, they lack binding authority. In fact, the CERD Committee and others have occasionally faced formidable state resistance.<sup>81</sup> And while several advance wide-ranging recommendations on indigenous remedies, “concluding observations” to states often cannot reach precision with respect to particular disputes or individuals. The reporting process of U.N. treaty bodies lacks the access to evidence and other resources available in court litigation. Even after individual complaint procedures, U.N. treaty bodies and regional commissions do not specify monetary damages beyond terms such as “just, fair and prompt” compensation.<sup>82</sup>

In contrast, the Inter-American Court exercises binding jurisdiction, and has issued numerous, detailed orders for both monetary and non-monetary reparations. It has required these remedies in a variety of

78. See *Ctr. for Minority Rights Dev. v. Kenya*, Comm. No. 276/03 (Afr. Comm’n on Hum. & Peoples’ Rts. Feb. 4, 2010). In its well-known decision involving the Ogoni People, the African Commission also recommended extensive reparations. *Soc. & Econ. Rights Action Ctr. v. Nigeria*, Comm. No. 155/96 (Afr. Comm’n Hum. and Peoples’ Rts. 2001) available at [http://www.achpr.org/files/sessions/30th/communications/155.96/achpr30\\_155\\_96\\_eng.pdf](http://www.achpr.org/files/sessions/30th/communications/155.96/achpr30_155_96_eng.pdf).

79. *Ctr. for Minority Rights Dev.*, Comm. No. 276/03, ¶ 214.

80. *Id.* at Recommendations ¶ 1.

81. See, e.g., CHARTERS, *supra* note 51, at 184–85 (noting that Australia and New Zealand have rejected CERD Committee views); Viljoen & Louw, *supra* note 77, at 4 (referring to cases where States did not implement any of the African Commission’s recommendations, and/or where States directly challenged the Commission’s findings). In 2011, the Inter-American Commission requested that Brazil halt construction on the Belo Monte hydroelectric power plant, a large initiative that endangered indigenous communities of the Xingu River Basin in Pará, Brazil. Inter-Am. Comm’n H.R., *Precautionary Measures: Indigenous Communities of the Xingu River Basin, Pará, Brazil*, PM 382/10 (Apr. 1, 2011), available at <http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp>. In response, the State withdrew its OAS ambassador and stopped paying dues to the regional organization. See *The Americas, Chipping at the Foundations: The Regional Justice System Comes under Attack from the Countries whose Citizens Need it Most*, THE ECONOMIST (June 9, 2012), available at <http://www.economist.com/node/21556599/print>.

82. E.g., High Commissioner of H.R., CERD Belize (GH/SP) (Mar. 3, 2012) (“Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation.”)

situations, for both indigenous communities and individuals. As a result, advocates, officials, and judges around the world now turn to the Court for specific standards and solutions. In fact, many of the reparations discussed above trace their origin to the Court's exacting case law.<sup>83</sup> As its global influence increases, a close assessment of the Court's reparations for indigenous peoples is necessary.

## II. THE INTER-AMERICAN COURT'S CASE LAW: REPARATIONS FOR INDIGENOUS PEOPLES

### A. Introduction

#### 1. Definition and Case Selection

This section examines cases predominately involving indigenous individuals and communities. While the Inter-American Court has not provided an exhaustive definition of indigenous peoples, it has emphasized that self-identification is important,<sup>84</sup> and has offered characteristics that it finds significant: peoples who possess "social, cultural and economic

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83. The UN Special Rapporteur on indigenous rights refers to the Inter-American Court as a key legal authority for indigenous reparations standards. See, e.g., H.R. Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, ¶ 75, U.N. Doc. A/HRC/15/37 (2010) (prepared by James Anaya) (stating, for example, "the practice of the Inter-American Court of Human Rights offers . . . a series of highly pertinent examples of compensation and reparation in cases of damage to indigenous peoples' social and cultural practices"). The African Commission on Human and Peoples' Rights, among other bodies, has also been deeply influenced by Court judgments. See, e.g., Ctr. for Minority Rights Dev. (Kenya) v. Kenya, Comm. No. 276/2003, ¶¶ 233–38, 263–68, 294–98 (Afr. Comm'n on Human & Peoples' Rights Feb. 4, 2010) (citing various Inter-American Court standards on reparations, compensation, and benefit sharing). See also Comm. on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention*, Paraguay, ¶ 17, U.N. Docs. CERD/C/PRY/CO/1-3 (September 12, 2011) (The CERD Committee "calls upon the State party to take, as a matter of urgency, the necessary steps to fully comply with the judgments of the Inter-American Court of Human Rights"); Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on the third periodic report of Ecuador as Approved by the Committee at its forty-ninth session*, Ecuador, ¶ 9, U.N. Docs. E/C.12/ECU/CO/3 (November 10, 2012) (The Committee on Economic, Social and Cultural Rights "urges the State party to comply with the orders of the Inter-American Court of Human Rights" in its judgment concerning the Kichwa Indigenous People of Sarayaku); H. R. Council, *Report of the Expert Mechanism on the Rights of Indigenous Peoples*, ¶¶ 6, 12, 24, U.N. Docs A/HRC//18/42 (August 17, 2011) (repeatedly citing to the Inter-American Court's jurisprudence). Brenda Gunn argues that the Inter-American Court's broad remedial standards should inform determinations of "fair compensation" in Canadian indigenous cases. See Brenda L. Gunn, *More Than Money: Using International Law of Reparations To Determine Fair Compensation For Infringements of Aboriginal Title*, 46 U. BRIT. COLUM. L. REV. 299, 331 (2013).

84. See, e.g., Xákmok Kásek Indigenous Cmty v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 37 (Aug. 24, 2010) ("[F]rom its name to its membership . . . the Court and the State must restrict themselves to respecting . . . the way in which it [the community] identifies itself.") (footnotes omitted).

traditions different from other sections of the national community,” who “identify[] themselves with their ancestral territories,” and who “regulate[] themselves, at least partially, by their own norms, customs, and traditions.”<sup>85</sup> In addition, when several of these characteristics are demonstrated, the Court has considered certain “tribal” populations to be equivalent to indigenous groups.<sup>86</sup> This Article includes these “tribal” cases concerning Afro-Latin populations such as the Maroons of Suriname.

## 2. The Court’s General Criteria for Monetary and Non-monetary Remedies

When the Court declares individuals or whole communities<sup>87</sup> to be victims of human rights violations, they become “injured parties” under the American Convention and beneficiaries of reparations.<sup>88</sup> The Convention provides:

[T]he Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.<sup>89</sup>

The Court has established that “reparations must be related to the facts of the case, the violations that have been declared, the damage proven, and the measures requested to repair the respective damage.”<sup>90</sup> For the Court,

85. *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 79 (Nov. 28, 2007) (citing ILO Convention, *supra* note 2, art. 1). Note that these characteristics are enumerated in a judgment involving “tribal” peoples, not indigenous groups. However, the descriptors (borrowed from the ILO Convention, Article 1) refer to characteristics shared by tribal *and* indigenous peoples, according to the Court.

86. The Court has referred to Afro-Latin populations such as the Saramaka as “tribal peoples” that are “not indigenous to the region, but that share similar characteristics with indigenous peoples.” *Id.*

87. In *Sarayaku v. Ecuador*, the Court, for the first time, held that the indigenous community *itself* suffered human rights violations. *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 341 (June 27, 2012). This holding appears to disregard Article 1 of the American Convention, the central provision that obligates States Parties to respect and ensure the treaty’s rights to “all persons subject to their jurisdiction”—“person” defined as “every human being.” See American Convention on Human Rights, art. 1, Nov. 22, 1969, 1144 U.N.T.S. 123. In this sharp break with the past, the *Sarayaku* Court apparently adopted a wider definition of “person,” perhaps following the views of bodies such as the U.N. Committee on Economic, Social and Cultural Rights. See Comm. on Econ., Soc. and Cultural Rights, Gen. Comment No. 21: Right of Everyone to Take Part in Cultural Life, ¶ 9, UN Doc. E/C.12/GC/21 (Dec. 21, 2009) (“[T]he Committee recognizes that the term ‘everyone’ in the first line of article 15 may denote the individual or the collective . . .”).

88. American Convention on Human Rights, *supra* note 87, art. 63.

89. *Id.*

90. *Fernández Ortega v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 215, ¶ 221 (Aug. 30, 2010). See also *Radilla-Pacheco v.*

then, “general requests” with little factual or legal foundation are insufficient, as they impede an analysis of “their purpose, reasonableness, and scope.”<sup>91</sup>

As for material damages in particular, the Court compensates the “loss of or detriment to the victims’ income, the expenses incurred owing to the facts, and the consequences of a pecuniary nature that have a causal nexus with the facts of the case.”<sup>92</sup> On the other hand, to redress moral damages, the Court generally orders both monetary and non-monetary remedies. Moral harm is defined as “the suffering and grief caused to the direct victim and his next of kin, the harm to values that have great significance for the persons, as well as the changes of a non-pecuniary nature, in the living conditions of the victim or his family.”<sup>93</sup> The Court determines cash compensation under moral damages “through reasonable application of judicial discretion and equity.”<sup>94</sup> Non-monetary measures, for their part, are ordered “to commemorate and dignify victims, as well as to avoid the repetition of human rights violations.”<sup>95</sup>

## B. Cases Involving Communities

### 1. Massacres

*Aloeboetoe et al. v. Suriname* opened a dark chapter of Court cases

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Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 362 (Nov. 23, 2009).

91. See, e.g., *Fernández Ortega*, Inter-Am. Ct. H.R. (ser. C) No. 215, ¶ 274. See also *González (“Cotton Field”) v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 493 (Nov. 16, 2009).

92. See, e.g., *Río Negro Massacres v. Guatemala*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 307 (Sept. 4, 2012). See also *Las Dos Erres Massacre v. Guatemala*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 31, ¶ 275 (Nov. 24, 2009) (“The Court has developed the concept of pecuniary and non-pecuniary damage, and situations in which they must be redressed.”) (footnotes omitted).

93. See, e.g., *Río Negro Massacres*, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 307 (citing “Street Children” (*Villagrán Morales*) v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 77, ¶ 84 (May 26, 2001)); *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 318 (June 27, 2012). See also *Dos Erres Massacre*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 31, ¶ 275 (Nov. 24, 2009) (“The Court has developed the concept of pecuniary and non-pecuniary damage, and situations in which they must be redressed.”) (footnotes omitted).

94. See, e.g., *Moiwana Cmty. v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 191 (June 15, 2005). See also *Serrano-Cruz Sisters v. El Salvador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 156 (Mar. 1, 2005).

95. See, e.g., *Moiwana Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 191. See also *Serrano-Cruz Sisters*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 156 (Mar. 1, 2005).

that never closed: massacres of indigenous and tribal populations in the Americas. In *Aloeboetoe*, army soldiers killed six persons suspected of belonging to an insurgency movement.<sup>96</sup> The victims were Saramakas, an Afro-Latin community that the Court would subsequently consider a “tribal” population.<sup>97</sup> Suriname eventually accepted responsibility for the deaths, prompting the Court to formulate reparations.<sup>98</sup> To do so, it first had to determine the deceased victims’ successors.

The parties had disputed this point. The Inter-American Commission<sup>99</sup> had urged the Court to follow Saramaka customs, which include matrilineal family configurations and the practice of polygamy.<sup>100</sup> In contrast, Suriname had insisted that national civil law was applicable.<sup>101</sup> The Court responded that “the obligation to make reparation . . . is governed by international law, which also applies to the determination of the manner of compensation and the beneficiaries thereof.”<sup>102</sup> However, the Court then observed, “under international law there is no conventional or customary rule that . . . [indicates successors. Thus,] the Court has no alternative but to apply general principles of law.”<sup>103</sup> It concluded that such principles recognize children, spouses, and ascendants as heirs.<sup>104</sup>

The Court then applied these three categories to the Saramaka context, deciding to take into account the community’s customs “to the degree that it does not contradict the American Convention.”<sup>105</sup> The Court chose to

96. See *Aloeboetoe v. Suriname, Reparations and Costs, Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 5 (Sept. 10, 1993).

97. See *Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 79 (Nov. 28, 2007).

98. The Court did not find it necessary to hold the State responsible for specific violations of the American Convention. See *Aloeboetoe v. Suriname, Merits, Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 11, ¶ 23 (Dec. 4, 1991) (“In view of the fact that the Government of Suriname has acknowledged its responsibility, the Court holds that the dispute concerning the facts giving rise to the instant case has now been concluded. As a result, all that remains is for the Court to decide on reparations and court costs.”).

99. Most litigation before the Court is initiated by the submission of the Inter-American Commission’s application. Since the year 2000, individuals alleging rights violations have been allowed to participate fully in all phases of the proceedings before the Court. Previously, they could only act through the Commission, until reaching the reparations stage.

100. See *Aloeboetoe*, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 55.

101. See *id.*

102. *Id.*

103. *Id.* ¶ 61.

104. *Id.* ¶ 62.

105. *Id.* A similar constraint is found in international instruments such as the ILO Convention, Article 8(2). See ILO Convention, *supra* note 2, art. 8. Karen Engle states that this use of a “repugnancy clause” or “invisible asterisk” on indigenous rights represents an important limitation to the Court’s acceptance of customary law in *Aloeboetoe*. See ENGLE, *supra* note 1, at 125–36 (“These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with

give preference to Saramaka tradition over national law because the community lived independently from the national legal framework; Suriname had not even provided “the facilities necessary for the registration of births, marriages, and deaths” of the Maroon population.<sup>106</sup> Still, the Court did not wholly adopt Saramaka customs. It remarked that, “in referring to ‘ascendants,’ the Court shall make no distinction as to sex, even if that might be contrary to Saramaka custom.”<sup>107</sup>

After identifying successors, the Court determined material and moral damages. Material damages were established for lost earnings and expenses incurred.<sup>108</sup> In a rare move, the Court had sent a delegate to Suriname to collect relevant information for these calculations.<sup>109</sup> The judgment set moral damages at \$29,070 for each of the executed victims; this figure had been suggested by the Commission.<sup>110</sup> But the Court only reluctantly ordered damages for the victims’ family members and dependents.<sup>111</sup>

The Commission had alleged that the killings were racially motivated and urged collective reparations for the Saramaka community.<sup>112</sup> The Court eventually ordered Suriname to reopen a village school and staff it with personnel, as well as to bring a local medical clinic back into operation.<sup>113</sup> At the time, these demanding equitable remedies were unprecedented for the Court. The Court also stressed “the State is obligated . . . to inform the relatives of the fate of the victims and . . . the location of their remains.”<sup>114</sup> The Court noted that Suriname’s duty in this

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fundamental rights defined by the national legal system and with internationally recognized human rights.”).

106. *Aloeboetoe*, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 58.

107. *Id.* ¶ 62.

108. *See id.* ¶¶ 90–95.

109. *See id.* ¶¶ 87–88.

110. *Id.* ¶¶ 92–93.

111. First, the Court required significant proof to show economic dependency for material damages. *See id.* ¶¶ 69–73. On the other hand, the Court presumed that some parents had suffered moral damages. *See id.* ¶ 76. But the Court only ordered moral damages for the parents that it had *not* designated as successors, reasoning that those named successors would already receive compensation. *See id.* ¶¶ 76–77. Evidently, the Court confused the moral damages for the killed victims, to be inherited by their successors, with the moral damages that family members should receive in their own right.

112. *Id.* ¶¶ 82–83.

113. *Id.* ¶ 96. The Court granted these collective reparations despite stating: “[i]n practice, the obligation to pay moral compensation does not extend to such communities, nor to the State in which the victim participated; these are redressed by the enforcement of the system of laws. If in some exceptional case such [communal] compensation has ever been granted, it would have been to a community that suffered direct damages.” *Id.* ¶ 83.

114. *Id.* ¶ 109 (citing *Velásquez-Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R.

regard “is of particular importance in the instant case, given the family relationships that exist among the Saramakas.”<sup>115</sup>

Far less impressive was the Court’s modality for distributing monetary (material and moral) damages. It required two trust funds, one for child beneficiaries and the other for adults.<sup>116</sup> Once the children reached majority, they became subject to the same conditions as adult beneficiaries. Adult beneficiaries could only withdraw up to 25% of their monetary reparations initially; subsequent withdrawals were allowed only on a semi-annual basis. Moreover, the Court called for a foundation “to act as trustee of the funds deposited . . . and to advise the beneficiaries as to the allocation of the reparations received or of the income they obtain from the trust funds.”<sup>117</sup> Thus, while *Aloeboetoe* has been praised as remarkable for its acceptance of customary law,<sup>118</sup> this recognition was limited,<sup>119</sup> and—in any event—was ultimately overshadowed by the Court’s paternalism.<sup>120</sup>

Eleven years passed until the Court heard another case concerning the massacre of tribal or indigenous populations. By then the Court had become more sophisticated in identifying and responding to the manifold consequences of human rights abuse. Still, almost nothing could have prepared it for *Plan de Sánchez Massacre v. Guatemala*; no human rights court had ordered reparations for a tragedy of this magnitude.<sup>121</sup> In 1982, an army commando unit stormed into the village of Plan de Sánchez, under the pretext that the community was aligned with guerrilla forces.<sup>122</sup> Over 260 persons were executed in a single day, most of them members of the Maya Achí indigenous people.<sup>123</sup>

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(ser. C) No. 4, ¶ 181 (July 29, 1989); *Godínez Cruz v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 5, ¶ 191 (Jan. 20, 1989)) (emphasis omitted).

115. *Id.*

116. *See id.* ¶¶ 99–102.

117. *Id.* ¶ 105.

118. *See, e.g.*, LAURENCE BURGORGUE-LARSEN & AMAYA ÚBEDA DE TORRES, *THE INTER-AMERICAN COURT OF HUMAN RIGHTS: CASE LAW AND COMMENTARY* 522 (2011).

119. *See supra* note 44 and accompanying text.

120. *See* Ariel E. Dulitzky, *When Afro-Descendants Became “Tribal Peoples”: The Inter-American Human Rights System and Rural Black Communities*, 15 *UCLA J. INT’L L. & FOREIGN AFF.* 29, 49–52 (2010) (criticizing the Court’s “administrative and participatory paternalism”).

121. *See* *Plan de Sánchez Massacre v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 105, ¶ 1 (Apr. 29, 2004) (separate opinion of Cançado-Trindade, J.). With respect to sheer number of victims, *Plan de Sánchez* far surpassed the Court’s preceding cases. *See e.g.*, *Aloeboetoe v. Suriname*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶¶ 4–5 (Sept. 10, 1993) (seven deaths); *El Amparo v. Venezuela*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 28, ¶ 3 (Sept. 14, 1996) (fourteen deaths).

122. *Plan de Sánchez Massacre*, Inter-Am. Ct. H.R. (ser. C) No. 105, ¶ 42.

123. *Id.*

The Court's reparations judgment, delivered in 2004, focused upon the numerous survivors. Because Guatemala had accepted the Court's jurisdiction five years after the attack, the State was not held responsible for the actual executions.<sup>124</sup> Still, Guatemala recognized legal responsibility for breaches of the rights to personal integrity, due process, judicial protection, privacy, property, and equal protection, as well as violations to the freedoms of religion, expression, and association.<sup>125</sup>

The Court found that the survivors' homes, animals, and other property had been destroyed or stolen.<sup>126</sup> Villagers fled the area and were not authorized to return until 1985.<sup>127</sup> Even then, they were constantly under the threatening surveillance of the military.<sup>128</sup> While many pecuniary damages fell out of the Court's jurisdiction, it still recognized the impact on the community's "agricultural and other employment activities."<sup>129</sup> As a result, the Court ordered \$5,000 in material damages to each of the 317 survivors.<sup>130</sup> It also required that Guatemala implement, within five years, "a housing program to provide adequate housing to the surviving victims who live in that village . . . and who require it."<sup>131</sup> Since this program was ordered as a form of moral damages, it is unclear whether the Court asserted temporal jurisdiction over the houses' destruction, which had occurred before Guatemala's acceptance of the Court's competence. In any event, the Court could have ordered material damages for the homes, because the State had formally recognized responsibility for property violations.<sup>132</sup>

To assess moral damages, the Court weighed multiple factors.<sup>133</sup> The Court noted that the victims were unable to bury their dead, or to carry out essential funeral rites. Constant military presence repressed the community's traditional governance structure, the perpetrators of the massacre remained unpunished, and efforts at justice were met with threats

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124. *See id.* ¶ 4.

125. *Id.* at ¶¶ 36–38.

126. *Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 49(4) (Nov. 19, 2004).*

127. *Id.*

128. *Id.*

129. *Id.* ¶ 49(11).

130. *Id.* ¶ 74.

131. *Id.* ¶ 105 (footnote omitted).

132. *See Plan de Sánchez Massacre v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 105, ¶ 36 (Apr. 29, 2004)* (stating the terms of Guatemala's acceptance of responsibility for the various violations).

133. *See Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 87 (Nov. 19, 2004).*



and harassment.<sup>134</sup> In recognition of the victims' suffering and the deterioration of their physical and mental health, the Court ordered \$20,000 in moral damages to each of the 317 survivors.<sup>135</sup>

Turning to non-monetary measures, the Court made a significant pronouncement: "Given that the victims in this case are members of the Mayan people, this Court considers that an important component of the . . . reparation is the reparation that the Court will now grant to the members of the community as a whole."<sup>136</sup> Several of the reparative measures ordered for the community broke new ground.

On many occasions, the Court had ordered the publication of its judgments and public acts for the state to acknowledge responsibility for rights violations. However, before *Plan de Sánchez* it had never required that such publications and events be carried out in the community's own language, in addition to the national language.<sup>137</sup> The Court directed that a public event take place at the site of the massacre, with the participation of "high-ranking State authorities," and "taking into account the traditions and customs of the members of the affected communities."<sup>138</sup>

The judgment also required a development program on an unparalleled scale. As noted above, in *Aloeboetoe* the Court had called for the State to reopen a local school and medical clinic. In *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, a judgment from 2001 discussed below, the Court had instructed the State to invest \$50,000 "in works or services of collective interest for the benefit of the [community]."<sup>139</sup> But *Plan de Sánchez* ordered, "in addition to the public works financed by the national budget allocated to that region," the following to be completed within five years: maintenance and improvement of the community roads, sewage system, and potable water supply; establishment of a health center in the village; allocation of teachers "trained in intercultural and bilingual teaching for primary, secondary and comprehensive schooling"; and "study and dissemination of the Maya-Achí culture in the affected communities

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134. *See id.*

135. *Id.* ¶¶ 88–89.

136. *Id.* ¶ 86.

137. *See id.* ¶ 102 ("The Court considers that the State must translate the American Convention on Human Rights into the Maya-Achí language, if this has not been done already, as well as the judgment on merits delivered by the Court on April 29, 2004, and this judgment. Guatemala must also provide the necessary resources to publicize these texts in the municipality of Rabinal and deliver them to the victims of the instant case.").

138. *Id.* ¶¶ 100–01.

139. *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 167 (Aug. 31, 2001).

through the Guatemalan Academy of Mayan Languages.”<sup>140</sup>

The Court had been encouraged to provide such ambitious reparations by the victims’ submissions, as well as by indications that the State would be receptive to reinforcing social services.<sup>141</sup> In addition to those programs, the judgment required the housing program mentioned above and improvements to the community’s chapel. A broad medical and psychological treatment program was also mandated.<sup>142</sup> Finally, because of the ongoing impunity in the case, the Court underscored Guatemala’s obligation to investigate the facts and “identify, prosecute and punish the perpetrators and masterminds.”<sup>143</sup>

In 1986, a year before the crimes of *Aloeboetoe*, Suriname had perpetrated another mass murder. *Moiwana Village v. Suriname* eventually reached the Court and was decided in 2005.<sup>144</sup> Government and militia forces attacked Moiwana Village on the suspicion that community members supported an insurgency movement.<sup>145</sup> State agents and collaborators killed at least thirty-nine defenseless Moiwana residents, and wounded many others.<sup>146</sup> Survivors fled the region and refused to return.<sup>147</sup>

Like the victims of *Aloeboetoe*, Moiwana residents were Maroons; they belonged to one cultural group, the N’djuka, and the *Aloeboetoe* victims belonged to the Saramaka. Similar to *Plan de Sánchez*, the Moiwana massacre occurred before the State had accepted the Court’s jurisdiction.<sup>148</sup> Therefore, the judgment refused to assess violations of the right to life.<sup>149</sup> Although Suriname contested most allegations, the Court found violations of the freedom of movement, and the rights to personal integrity, due process, judicial protection, and property.<sup>150</sup>

The Court observed that community members continued to suffer displacement, and, as a result, “their ability to practice their customary

140. *Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 110 (Nov. 19, 2004).

141. *Id.* ¶ 109 (“The State also indicated that the measures of reparation could comprise the obligation of the State to provide social services, in accordance with international standards.”)

142. *Id.* ¶¶ 107–08.

143. *Id.* ¶ 98.

144. *Moiwana Cmty. v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005).

145. *Id.* ¶¶ 86(12), 86(27).

146. *Id.* ¶ 86(15).

147. *Id.* ¶¶ 86(15), 86(19).

148. *See id.* ¶ 4.

149. *See id.* ¶ 233 (finding no violation of the right to life).

150. *Id.* ¶ 233(1)–(4).

means of subsistence and livelihood” was “drastically limited.”<sup>151</sup> Because of the ongoing deprivation of home and property, the Court had jurisdiction over these facts and presumed material damages of \$3,000 for each of the 130 survivors.<sup>152</sup> “In efforts to repair the loss of [their] homes,” the Court ordered another significant measure discussed below.<sup>153</sup>

The judgment called for \$10,000 per survivor for moral damages.<sup>154</sup> This assessment took into account several factors. Despite “N’djuka emphasis upon punishing offenses in a proper manner,” efforts at prosecution had been obstructed by the State, and no conviction for the attack had resulted.<sup>155</sup> The reigning impunity and the N’djuka community members’ inability to bury their dead produced anguish and “spiritually-caused illnesses.”<sup>156</sup> Afraid to return home, the community’s connection to its traditional lands—“of vital spiritual, cultural and material importance”—was severed.<sup>157</sup>

The petitioners had also requested that Suriname “rebuild the houses in the village and construct, furnish and staff fully-equipped and functional educational and health facilities, all with the prior informed consent of the victims and with their full cooperation.”<sup>158</sup> In response, the Court ordered the establishment of a \$1.2 million fund to be directed “to health, housing and educational programs for the Moiwana community members.”<sup>159</sup> In contrast to *Plan de Sánchez*, which mandated specifics about such programs without indicating a budget, *Moiwana Village* determined the fund’s total amount and then set up a committee to decide how precisely to deploy those resources. The implementation committee was composed of three members: one chosen by the victims, another by the State, and the third upon the agreement of both parties.<sup>160</sup>

At first glance, the three-person committee could represent an enhancement to the *Plan de Sánchez* methodology. There, the Court did not directly ensure the input or participation of the victims in the development programs. Also, *Moiwana*’s inclusion of a state representative—if a supportive, dedicated liaison for victims—could

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151. *Id.* ¶ 186.

152. *Id.* ¶ 187.

153. *Id.*

154. *Id.* ¶ 196.

155. *Id.* ¶ 195(a).

156. *Id.* ¶ 195(b).

157. *Id.* ¶ 196(c).

158. *Id.* ¶ 199(h).

159. *Id.* ¶ 214.

160. *Id.* ¶ 215.

facilitate negotiations with an intractable government, as Suriname had proved to be at the time. But the Court stopped short of fulfilling the petitioners' request; it did not require the community's "prior informed consent" and their "full cooperation" in any development initiative.<sup>161</sup> The three-person committees are discussed further in Part III.<sup>162</sup>

As for other measures to redress moral damage, the Court directed Suriname to investigate and prosecute, as well as to recover and deliver the remains of community members killed during the attack.<sup>163</sup> It required the State to issue an apology during a public ceremony with the N'djuka leader and high-ranking government authorities.<sup>164</sup> The Court also ordered the construction of a memorial, whose "design and location shall be decided upon in consultation with the victims' representatives."<sup>165</sup> With respect to the community's traditional lands, the Court instructed the State to implement an effective mechanism for their delimitation, demarcation, and titling—all with the victims' participation and informed consent.<sup>166</sup> Thus, various *Moiwana* remedies demanded the survivors' involvement, moving away from the "top-down" approach found in judgments such as *Aloeboetoe* and *Plan de Sánchez*. Finally, as a novel form of reparation, the Court required safety guarantees for any community members who decide to return to Moiwana Village.<sup>167</sup>

At the time of the Plan de Sánchez massacre, during Guatemala's civil war, there were hundreds of other vicious attacks against indigenous peoples. The Guatemalan Army considered many communities to be the "internal enemy," supportive of guerrilla initiatives, and so conducted "scorched-earth" operations against them.<sup>168</sup> *Río Negro Massacres v. Guatemala*, a Court decision from 2012, concerned five of these brutal operations, all contemporaneous with *Plan de Sánchez*.<sup>169</sup> Like the killings in *Plan de Sánchez*, the *Río Negro* executions themselves fell out of the

161. *See id.* ¶ 199.

162. *See infra* Part III.

163. *Moiwana Cmty. v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶¶ 202–08 (June 15, 2005).

164. *Id.* ¶ 216.

165. *Id.* ¶ 218.

166. *Id.* ¶¶ 209–11.

167. *Id.* ¶ 212.

168. *Río Negro Massacre v. Guatemala*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 57 (Sept. 4, 2012); *Commission for Historical Clarification*, GUATEMALA MEMORY OF SILENCE: REPORT OF THE COMMISSION FOR HISTORICAL CLARIFICATION 17–23 (1999), available at [http://www.aaas.org/sites/default/files/migrate/uploads/mos\\_en.pdf](http://www.aaas.org/sites/default/files/migrate/uploads/mos_en.pdf).

169. *Río Negro Massacres*, Inter-Am. Ct. H.R. (ser. C) No. 250 at ¶¶ 55, 57.

Court's jurisdiction.<sup>170</sup> Still, the Court had competence over the case's continuing violations, including, among others, forced disappearances, deeply flawed criminal investigations, forced displacement, and physical and psychological impacts upon the next of kin and survivors.<sup>171</sup>

After accepting Guatemala's "partial" recognition of liability and finding several human rights violations, the Court proceeded to assess reparations.<sup>172</sup> Like previous cases, it stressed that both collective and individual measures were necessary.<sup>173</sup> The Court made the unusual decision to combine material and moral damages.<sup>174</sup> In equity, it ordered total monetary compensation according to the following parameters: \$30,000 for each victim of forced disappearance, \$15,000 for each surviving massacre victim, \$10,000 to each survivor who had a family member disappear, and an additional \$10,000 to each survivor who was a victim of slavery or involuntary servitude.<sup>175</sup> Compensation already granted to victims under Guatemala's National Reparations Program was subtracted from these amounts.

The judgment set out sweeping non-monetary remedies, most of which responded to the victims' requests.<sup>176</sup> Like *Plan de Sánchez*, the Court insisted on prompt investigation and prosecution,<sup>177</sup> as well as public recognition of responsibility, and publication of the judgment.<sup>178</sup> Both the event and the publication had to be translated into the Maya Achi language. In fact, many of the measures contemplated the Mayan worldview. When ordering the identification and return of remains, the Court opined that such steps would help close "the mourning process" and "contribute to the reconstruction of [the Maya Achi's sense of] cultural integrity."<sup>179</sup> Further,

170. *Id.* ¶ 39.

171. *Id.* ¶ 38.

172. *Id.* ¶¶ 17, 245–248.

173. *See id.* ¶ 272.

174. *Id.* ¶ 309; *see also* YATAMA v. Nicaragua, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 127, ¶ 248 (June 23, 2005) (combining "pecuniary and non-pecuniary damage" into a single amount).

175. *Rio Negro Massacres*, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 309.

176. Still, certain details requested by petitioners were omitted by the Court, and other measures were refused entirely. *See id.* ¶¶ 293–95.

177. The Court's requirements on this subject are very demanding and specific. *See id.* ¶ 257.

178. *See id.* ¶ 275 (holding Guatemala "must reproduce the official summary of this Judgment in Spanish and in the Maya Achi language, and distribute it, in coordination with the representatives, in the communities in the department of Baja Verapaz. The distribution must be carried out within one year term, with a print run of at least 1,500 copies.").

179. *Id.* ¶ 265; *see also id.* ¶ 269 (ordering that "the State implement, through the institutions that it considers suitable for this purpose, within one year, a genetic information bank to safeguard the information, on the one hand, of the osseous remains that are found and exhumed and, on the other, of

the State was obligated to cover funeral costs “in agreement with the next of kin . . . [and while] respecting their beliefs.”<sup>180</sup>

The judgment even called for a program “for the rescue, promotion, dissemination and conservation of . . . ancestral customs and practices, based on the values, principles and philosophies of the Maya Achi people.”<sup>181</sup> This initiative “must be designed and executed with the active participation of the members of the Río Negro community” and their representatives.<sup>182</sup> Also noteworthy, the Court mandated medical and psychological treatment consonant with indigenous medicine and customary practices.<sup>183</sup>

The reparations did not stop there. The victims had requested the building of a museum to “honor the memory of the numerous victims of the internal armed conflict.”<sup>184</sup> Before the judgment, Guatemala had indicated that it would agree to the museum. The Court approved, expressing its satisfaction with the State’s commitment.

Finally, the Court turned its attention to the case’s displaced communities. The Guatemalan government had relocated many Río Negro survivors to the Pacux settlement.<sup>185</sup> But the Court observed that the living conditions in Pacux have not allowed its inhabitants to return to their traditional economic activities. Instead, they have had to participate in economic activities that have not provided them with a stable income, and this has also contributed to the disintegration of the social structure and the cultural and spiritual life of the community.<sup>186</sup>

In light of the “precarious living conditions” in Pacux, the judgment ordered that the State build or improve: the health center’s resources, nutrition programs, roads, affordable electrical service, water, drainage and sewage systems, and schools, including “the establishment of a bilingual, Spanish and Maya Achi, high school education program.”<sup>187</sup> No sum was specified for these purposes.

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the next of kin of the persons who were presumably executed or disappeared during the acts perpetrated in the context of the massacres of the community of Río Negro.”).

180. *Id.* ¶ 270.

181. *Id.* ¶ 285.

182. *Id.*

183. *Id.* ¶ 289. But see my comments on this point *infra* Part III.

184. *Id.* ¶ 279.

185. *Id.* ¶ 83–84.

186. *Id.* ¶ 183.

187. *Id.* at ¶ 284.

## 2. Lands and Natural Resources

In 2001, the Inter-American Court issued its leading judgment on indigenous land rights, *Mayagna (Sumo) Awas Tingni v. Nicaragua*.<sup>188</sup> The State had granted a logging company concessions to take timber from the community's traditional lands.<sup>189</sup> Despite provisions in Nicaraguan law that recognized communal properties on the Atlantic coast, the Awas Tingni lacked official title to their territory.<sup>190</sup> The Court concluded that Article 21 of the American Convention (right to property) protected the Awas Tingni's ancestral property rights.<sup>191</sup> This ruling on an indigenous right to communal property was a first for an international human rights tribunal.<sup>192</sup> The Court also found, among other violations, that the community members' right to judicial protection was breached.<sup>193</sup>

*Awas Tingni's* reparations set the precedent for *Moiwana's* property remedies, discussed above. Specifically, Nicaragua was ordered to adopt in its domestic law "the legislative, administrative, and any other measures necessary to create an effective mechanism for delimitation, demarcation, and titling" of the communal lands, all "in accordance with [the Awas Tingni's] customary law, values, customs and mores."<sup>194</sup> The Court stressed that the State must ensure "full participation by the Community" in this regard.<sup>195</sup> Second, upon implementation of the mechanism, the State was required to "carry out the delimitation, demarcation, and titling of the corresponding lands"; in the interim, it needed to "abstain from any acts that might . . . affect the existence, value, use or enjoyment of the property."<sup>196</sup>

As noted earlier, the Court instructed the State to invest \$50,000 "in works or services of collective interest . . . by common agreement with the Community."<sup>197</sup> This sum was determined in equity to redress moral

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188. *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

189. *Id.* ¶ 153.

190. *Id.* ¶¶ 103, 151.

191. *Id.* ¶ 155.

192. See S. James Anaya & Maia S. Campbell, *Gaining Legal Recognition of Indigenous Land Rights: The Story of the Awas Tingni Case in Nicaragua*, in HUMAN RIGHTS ADVOCACY STORIES 117, 118 (Deena R. Hurwitz & Margaret L. Satterthwaite eds., 2009); Richard J. Wilson & Jan Perlin, *The Inter-American Human Rights System: Activities from Late 2000 through October 2002*, 18 AM. U. INT. L. REV. 651, 685 (2003).

193. *Mayagna (Sumo) Awas Tingni Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 173.

194. *Id.* ¶ 164.

195. *Id.*

196. *Id.*

197. *Id.* ¶ 167.

damages.<sup>198</sup> The Court did not examine moral suffering in detail, only alluding to the Awas Tingni's difficult situation "due to lack of delimitation, demarcation, and titling of their communal property."<sup>199</sup>

The Court never determined material damages. The brief on reparations was filed twelve days late; the Court considered the delay unreasonable and rejected the submission.<sup>200</sup> The brief, prepared by the Awas Tingni community's attorneys, requested a separate reparations phase to allow for the presentation of evidence and expert testimony.<sup>201</sup> It also set out a "preliminary declaration" that outlined substantial moral and material damages.<sup>202</sup> For its part, the State had maintained that the concession had not led to the harm of community lands.<sup>203</sup> Unfortunately, the Court refused to assess these significant claims and arguments.

Three cases against Paraguay—*Yakye Axa Community*, *Sawhoyamaxa Indigenous Community*, and *Xákmok Kásek Indigenous Community*—concerned displaced indigenous communities who had been unable to reclaim their traditional lands owing to flawed administrative procedures.<sup>204</sup> Incapable of practicing customary modes of subsistence in temporary settlements, these communities endured harrowing living conditions.<sup>205</sup> In each case, the Court found violations of the rights to life, due process, judicial protection, and property, among others. With respect to the right to life, *Yakye Axa* held that the community members' right to *vida digna*

198. *Id.*

199. *Id.*

200. *Id.* ¶ 159.

201. See *Reparations Brief of the Awas Tingni Community*, ¶ 6, Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001) (copy provided by the Inter-American Court's Secretariat and on file with author).

202. *Id.* ¶ 7. The brief requested \$500,000 for "lost economic opportunities", as the community had been unable to develop their land as they wished owing the insecurity of their property rights. *Id.* ¶ 26. It also claimed "at least \$50,000" for illegal logging damages, and \$200,000 in compensation for lands unlawfully taken by private parties. *Id.* ¶¶ 27–28.

203. See *Mayagna (Sumo) Awas Tingni Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 160(a) (claiming "execution of the logging activity derived from the concession granted to SOLCARSA did not begin, . . . However, the corporation did in effect cause damage to the forest in the area of Cerro Wakambay, through illegal felling of trees outside the area of the logging concession granted to it. The illegal action by SOLCARSA, which was external to the concession, was a private action not linked to any governmental permissiveness, and which was punished by the State authorities.").

204. See generally *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005); *Sawhoyamaxa Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006); *Xákmok Kásek Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214 (Aug. 24, 2010).

205. See, e.g., *Yakye Axa Indigenous Cmty.* Inter-Am. Ct. H.R. (ser. C) No. 125; *Xákmok Kásek Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 337(3)–(4); *Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 178.



(officially translated in the judgment as “decent life”) was breached, owing to abysmal conditions in the settlements.<sup>206</sup> *Xákmok Kásek* concluded that Paraguay was responsible for two separate right-to-life violations: the first for infringing the *vida digna* of the entire community, like *Yakye Axa*, and the second for not acting to prevent thirteen deaths, which were traced to the settlement’s health conditions.<sup>207</sup> In *Sawhoyamaxa*, the Court held the State responsible for nineteen such deaths, most of them children of the community.<sup>208</sup> Unaccountably, *Sawhoyamaxa* did not declare a distinct violation of *vida digna*.

The Court took a similar approach to material damages in all three judgments. In compensation for the numerous efforts conducted before national authorities to recover the lands, the Court awarded sums in equity to be delivered to each community’s leaders.<sup>209</sup> However, it declined to consider lost earnings of the communities, or the substantial “effect that not having possession of their traditional habitat has had on [their] *cosmovision* and on [their] members.”<sup>210</sup>

As for moral damages, the judgments again ordered development funds “as compensation for the non-pecuniary damage” suffered by the communities.<sup>211</sup> The Court required roughly comparable amounts to be invested in educational, housing, agricultural, and health projects.<sup>212</sup> Three-member committees, described above, were charged with program implementation.<sup>213</sup> However, in all three cases, petitioners had demanded a stronger role for community members in project design and execution.<sup>214</sup>

206. *Yakye Axa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 176.

207. *Xákmok Kásek Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 337(3)–(4).

208. *Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 178.

209. However, the sums vary significantly. *Yakye Axa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 195 (awarding \$45,000 for the Yakye Axa community); *Xákmok Kásek Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 317–18 (awarding \$10,000 for the Xákmok Kásek); *Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 218 (only awarding \$5,000 to the Sawhoyamaxa).

210. See *Xákmok Kásek Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 316–18 (noting the request to take into the account the *cosmovision* of the community, yet granting compensation only for “travel-related expenditure”); see also *Yakye Axa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 190–91, 194–95 (noting the request for compensation due to lost earnings, yet only granting compensation for travel expenses).

211. E.g., *Xákmok Kásek Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 323.

212. *Yakye Axa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 205 (\$950,000); *Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 224 (\$1,000,000); *Xákmok Kásek Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 323 (\$700,000).

213. *Yakye Axa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 206; *Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 225; *Xákmok Kásek Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 324.

214. See *Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 202(g) (“the

In all three cases, requests were also made for individualized payments for moral damages, aside from community funds.<sup>215</sup> Nevertheless, *Yakye Axa* called for only collective monetary and non-monetary remedies.<sup>216</sup> In *Sawhoyamaxa*, the Court ordered payment of \$20,000 for each of the 17 community members whose death was attributed to the State.<sup>217</sup> *Xákmok Kásek*, in a new formulation, required Paraguay to pay \$260,000 to “the leaders of the Xákmok Kásek Community” so that, “pursuant to their customs and traditions, they distribute the amounts due to each of the [thirteen] family members of the individuals who died or invest the money as they see fit.”<sup>218</sup> That is, rather than paying \$20,000 directly to the next of kin, community leaders were authorized to distribute the funds.<sup>219</sup> From an individual rights perspective, these orders are troubling, especially if the payments are not distributed in an equitable fashion.<sup>220</sup>

On the other hand, the non-monetary remedies granted by the Court were generous in the Paraguayan cases. All three decisions ordered: the prompt return of ancestral territories; the creation of “an effective mechanism for indigenous peoples’ claims to ancestral lands”; the provision of medical, nutritional, educational, and other basic services while the communities remain landless; and the publication and dissemination of the judgments.<sup>221</sup> Also of interest, both *Sawhoyamaxa* and *Xákmok Kásek* required the establishment of a registration and documentation program, as many community members had not been

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implementation of which [development] programs must be previously consented to by the interested parties and must adjust to their customs”; *Yakye Axa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 197(c) (holding that “[development fund] implementation will require prior consent by those involved, in accordance with their practices and customs”); Xákmok Kásek Community’s Brief containing Pleadings, Motions, and Evidence, Part IV (copy provided by the Inter-American Court’s Secretariat and on file with author).

215. *Yakye Axa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 197(c); *Sawhoyamaxa Community’s Brief* containing Pleadings, Motions, and Evidence, Part IV, available at <http://www.corteidh.or.cr/casos.cfm>; Xákmok Kásek Community’s Brief containing Pleadings, Motions, and Evidence, Part IV (copy provided by the Inter-American Court’s Secretariat and on file with author).

216. *Yakye Axa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 242.

217. *Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 226 (“That amount must be distributed among the next of kin of the victims pursuant to the cultural practices of the Sawhoyamaxa Community.”).

218. *Xákmok Kásek Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 325.

219. *Id.*

220. See *infra* Part III.

221. *Yakye Axa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 211–227; *Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 229–236; *Xákmok Kásek Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶¶ 281–306.

registered at birth and lacked official identification.<sup>222</sup>

In 2007, the Maroons returned to the Court to litigate *Saramaka People v. Suriname*.<sup>223</sup> In *Saramaka*, the Court analyzed resource extraction from communal lands to a far more detailed extent than in the *Awás Tingni* judgment. The petitioners had denounced the State's logging and mining concessions on their traditional lands—territories that nonetheless had not been officially recognized by Suriname.<sup>224</sup> In response, the Court held that Suriname should not have granted various concessions within Saramaka territory without complying with certain safeguards, including prior consultation, benefit-sharing, and impact assessments.<sup>225</sup> As a result, the Court found violations of the rights to property, juridical personality, and judicial protection.<sup>226</sup>

After assessing the evidence, the Court determined that “a considerable quantity of valuable timber was extracted” from the territory without any compensation, and the community was “left with a legacy of environmental destruction, despoiled subsistence resources, and spiritual and social problems.”<sup>227</sup> The State had also issued “small-scale” gold mining concessions within traditional Saramaka land.<sup>228</sup> By the date of the litigation, however, no gold had been mined from traditional Saramaka territory.<sup>229</sup>

For material damages, the Court ordered Suriname to pay only \$75,000 to compensate the community for the timber taken and related property damage.<sup>230</sup> The Court determined this figure “based on equitable

222. *Sawhoyamaya Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 231; *Xákmok Kásek Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 308. In addition, both *Yakye Axa* and *Xákmok Kásek* required a public act to recognize the State's responsibility. *Yakye Axa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 226; *Xákmok Kásek Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 297. *Sawhoyamaya* ordered a “communication system enabling victims to contact health authorities competent to address emergency cases.” *Sawhoyamaya Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 232. Furthermore, *Xákmok Kásek* called for “a permanent healthcare center in the settlement where the Community is temporarily located,” and a fine if the lands are delivered past the deadline. *Xákmok Kásek Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶¶ 306, 288.

223. See generally *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007).

224. *Id.* ¶ 93.

225. *Id.* ¶ 129.

226. *Id.* ¶ 214(1)–(3).

227. *Id.* ¶ 153.

228. *Id.* ¶ 156.

229. Final Written Argument of the Saramaka, ¶ 88 (July 6, 2007), available at <http://www.corteidh.or.cr/casos.cfm>; Brief of Pleadings, Motions and Evidence of the Saramaka, ¶ 44 (Nov. 3, 2006), available at <http://www.corteidh.or.cr/casos.cfm>.

230. *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 199 (Nov. 28, 2007).

grounds,” without explaining its calculations further.<sup>231</sup> It added the \$75,000 to a \$600,000 community development fund, which it established to redress the “suffering and distress” of the Saramaka community.<sup>232</sup>

The community development fund, again created as a form of moral reparation, was directed by the Court “to finance educational, housing, agricultural, and health projects, as well as provide electricity and drinking water, if necessary, for the benefit of the Saramaka people.”<sup>233</sup> To supervise implementation, the Court appointed a three-person committee, which “shall consult with the Saramaka people before decisions are taken and implemented.”<sup>234</sup> Yet the petitioners had requested more control, urging that all development projects be “determined and implemented with the *informed participation and consent* of the Saramaka people.”<sup>235</sup>

On the positive side, the Court’s other remedies required significant community involvement. Suriname was directed to demarcate and grant collective title for Saramaka territory “in accordance with their customary laws, and through previous, effective and fully informed consultations with the Saramaka people.”<sup>236</sup> The State was also required to grant the community legal recognition of their “collective juridical capacity . . . in accordance with their communal system, customary laws, and traditions,” and adopt national legislation to give legal effect to those rights “through prior, effective and fully informed consultations with the Saramaka people.”<sup>237</sup> Lastly, Suriname was ordered to publish and broadcast selections of the judgment, in both Dutch and Saramaka.<sup>238</sup>

*Kichwa Indigenous People of Sarayaku v. Ecuador*, handed down in 2012, concerned the Sarayaku, an indigenous community from the Ecuadorian Amazon.<sup>239</sup> While the State had granted a communal property title to the Sarayaku, it had reserved a number of rights, including rights to subsurface natural resources.<sup>240</sup> Ecuador eventually signed a contract with a foreign company to start oil exploration.<sup>241</sup> The Sarayaku resisted these

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231. *Id.*

232. *Id.* ¶ 200–01.

233. *Id.* ¶ 201.

234. *Id.* ¶ 202.

235. *Id.* ¶ 192 (emphasis added).

236. *Id.* ¶ 194.

237. *Id.* ¶ 194(c).

238. *Id.* ¶ 197.

239. See generally *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012).

240. *Id.* ¶ 62.

241. *Id.* ¶ 64.

activities, which damaged their lands and threatened their way of life.<sup>242</sup> The Court found breaches of the rights to collective property, life, personal integrity, due process, and judicial protection.<sup>243</sup>

*Sarayaku* replicated *Saramaka*'s disappointing material damages. The judgment granted the community only \$90,000 for environmental damage—including the “destruction” of Sarayaku forests—“suspension of production activities,” and expenses such as travel and legal costs.<sup>244</sup> The Court preferred to allocate far more value, \$1,250,000, to the community development fund for “the suffering caused to the People and to their cultural identity.”<sup>245</sup> Notably, the Court loosened its paternalistic methodology in *Sarayaku*, declaring that the fund “may be invested as the People see fit, in accordance with its own decision-making mechanisms and institutions.”<sup>246</sup> It is true that the Court found it necessary to offer guidance, suggesting “educational, cultural, food security, health care and eco-tourism development projects.”<sup>247</sup> Nevertheless, for the first time, full discretion was given to the community, and the three-person implementation committee was finally abandoned.

*Sarayaku* also required a series of demanding equitable remedies, including the removal of explosives left throughout the territory, as well as other cleanup and reforestation measures.<sup>248</sup> In addition, Ecuador was instructed to “implement effectively the right to prior consultation” of indigenous peoples, ensure “the participation of the communities themselves” in legislative and administrative reform, train government officials on indigenous rights, and conduct a public acceptance of liability “in the presence of senior State officials and [community] members” in Kichwa and Spanish. Finally, the State was ordered to broadcast, “through a radio station with widespread coverage in the southeastern Amazonian region, the official summary of the Judgment, in Spanish, Kichwa and other indigenous languages of this subregion.”<sup>249</sup>

### 3. Political Rights

In *YATAMA v. Nicaragua*, an indigenous organization's candidates

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242. *Id.* ¶¶ 92–123.

243. *Id.* ¶ 341.

244. *Id.* ¶¶ 313, 316.

245. *Id.* ¶ 323.

246. *Id.*

247. *Id.*

248. *Id.* ¶¶ 289–308.

249. *Id.*

were denied participation in municipal elections.<sup>250</sup> The Court found that the State's electoral laws placed discriminatory restrictions upon the candidates' political rights.<sup>251</sup> The candidates had also been unjustly prevented from contesting their exclusion through national tribunals.<sup>252</sup> According to the Court, then, Nicaragua violated the petitioners' political and due process rights, as well as their right to equality.<sup>253</sup>

Assessing documentation and testimony, the Court observed that the candidates had incurred various expenses during the electoral campaign. It refused to compensate loss of earnings, however, because "they do not have a causal relationship with the violations declared in the judgment."<sup>254</sup> As for moral damages, the Court recognized that selection as a political candidate signifies "a great honor among the members of the indigenous and ethnic communities of the Atlantic Coast."<sup>255</sup> When unjustly excluded from the elections, the candidates felt "frustration" at being unable to represent their communities, and concluded that the treatment was owed to discriminatory motives.<sup>256</sup>

In compensation for both material *and* moral damages, the Court ordered that the State pay \$80,000 to the YATAMA organization, "which should distribute it as appropriate."<sup>257</sup> Thus, while the Court determined that dozens of individuals were victims of rights violations, and petitioners had requested both individual and group remedies, it only awarded reparations to the collectivity. For its part, YATAMA was charged with the daunting—and judicial—task of disaggregating economic and moral damages. The judgment's non-monetary remedies were also of a collective, or societal, character. The Court ordered legislative reforms to eliminate discriminatory effects.<sup>258</sup> The decision was also to be published and broadcast on radio in the languages spoken on Nicaragua's Atlantic Coast: Spanish, Miskito, Sumo, Rama, and English.<sup>259</sup>

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250. See generally *YATAMA v. Nicaragua*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 127 (June 23, 2005).

251. *Id.* ¶ 229.

252. *Id.* ¶ 176.

253. *Id.* ¶ 275.

254. *Id.* ¶ 245.

255. *Id.* ¶ 246.

256. *Id.* ¶ 247.

257. *Id.* ¶ 248.

258. *Id.* ¶¶ 252–259.

259. *Id.* ¶ 253.

### C. Cases Involving “Single” Victims<sup>260</sup>

Mirroring Latin America’s tumultuous modern history, the Court has heard numerous cases of forced disappearances, extrajudicial executions, torture, rape, and discrimination. These crimes have victimized many indigenous individuals and their families.<sup>261</sup> This section begins the review with *López-Álvarez v. Honduras*,<sup>262</sup> a 2006 judgment about a Garifuna leader’s freedom of expression and right to equality.<sup>263</sup>

#### 1. Cultural Discrimination

López-Álvarez endured coercion to self-incriminate, inhuman treatment, detention for over six years in abysmal conditions—despite never having been convicted—and a prohibition from speaking his Garifuna language while in prison. Consequently, the Court found violations of his rights to personal integrity, liberty, equality, due process, and judicial protection, as well as his freedom of expression.<sup>264</sup>

The Court granted López-Álvarez \$25,000 in lost wages.<sup>265</sup> His family members were awarded \$10,000 for various expenses.<sup>266</sup> As for non-pecuniary damages, despite considering the varied abuses suffered by López-Álvarez, the Court only ordered the payment of \$15,000.<sup>267</sup> It granted lesser amounts to certain family members, who were considered victims in their own right.<sup>268</sup>

The equitable remedies also dashed the petitioners’ hopes. The Court called for a criminal investigation, improved detention conditions in

260. For convenience, the Article refers to this category as “single victims,” although the cases may actually involve several victims—generally, the principal victim and his or her family members.

261. The judgment in *Gudiel-Álvarez v. Guatemala*, concerning twenty-six victims of forced disappearance, mentions that perhaps two victims belonged to indigenous communities. *Gudiel-Álvarez v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 253, ¶ 189 (Nov. 20, 2012). But this was not a salient aspect of the case, nor were the remedies ordered specific to indigenous peoples. As a result, I omit this judgment from the present study.

262. *López-Álvarez v. Honduras*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 141 (Feb. 1, 2006).

263. According to the Court, “[t]he Garifunas are afro descendents mixed with indigenous people, whose origin goes back to the XVIII century and whose Honduran villages were developed in the North Coast of the Atlantic littoral region. Their economy is based on, among others, traditional fishing, cattle raising, the cultivation of rice, banana, and yucca, and the traditional production of fishing instruments. Male polygamy is admissible within the Garifuna culture. The Garifunas, as an ethnic minority, have their own culture, which has had great influence of the development of the Honduran culture.” *Id.* ¶ 54(1).

264. *Id.* ¶ 225.

265. *Id.* ¶ 194.

266. *Id.* ¶ 195.

267. *Id.* ¶ 202.

268. *Id.* (having suffered violations to their personal integrity).

Honduras, non-specified human rights training for prison officers, and the publication of the judgment.<sup>269</sup> But none of the measures directly addressed ethnic issues, despite demands from López-Álvarez's attorneys. For example, they urged "the measures necessary so that the Indian and Black populations may have complete access to justice; and especially so that they be allowed to use their mother tongue in all procedural actions and in the detention centers."<sup>270</sup> The Court's refusal to order reparations contemplating the Garifuna community at large is incongruous given the decision's pointed remarks on cultural discrimination,<sup>271</sup> and the remedies required in contemporaneous judgments such as *Moiwana* and *Yakye-Axa*.<sup>272</sup>

## 2. Disappearances, Extrajudicial Executions, Torture, and Rape

*Bámaca-Velásquez v. Guatemala*, decided on the merits in 2000, was the Court's first indigenous disappearance case.<sup>273</sup> It was a high-profile matter, as it involved Efraín Bámaca-Velásquez, a guerilla commander, and his U.S. spouse, Jennifer Harbury, who brought international attention to his plight.<sup>274</sup> Guatemalan soldiers captured Bámaca-Velásquez, held him in clandestine detention centers, and tortured him.<sup>275</sup> He was last seen tied to a bed in a military hospital, where he was questioned and abused.<sup>276</sup> The Court found violations of his rights to life, liberty, humane treatment, due process, and judicial protection, among others.<sup>277</sup>

While the Court still possessed relatively little experience with indigenous petitioners, it demonstrated sensitivity to Bámaca's Mayan heritage. Even in calculating lost wages, the Court acknowledged the "Mayan custom that the elder son usually contributes to the sustenance of his parents and siblings."<sup>278</sup> Significant expenses were granted to

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269. *Id.* ¶¶ 207–210.

270. *Id.* ¶ 205(a)(iv).

271. *Id.* ¶¶ 166–174.

272. *See infra* Part III(B).

273. *Bámaca-Velásquez v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70 (Nov. 25, 2000).

274. For a series of U.S. news articles on Bámaca-Velásquez and Harbury, see *In the News Jennifer Harbury*, Los Angeles Times, at <http://articles.latimes.com/keyword/jennifer-harbury>.<http://articles.latimes.com/keyword/jennifer-harbury>.

275. *Bámaca-Velásquez*, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 121.

276. *Id.* ¶ 121(1).

277. *Id.* ¶ 230.

278. *Bámaca-Velásquez v. Guatemala*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 91, ¶ 52 (Feb. 22, 2002). Note that the Court did not grant Bámaca-Velásquez compensation for lost wages for the time that he served as a "guerrilla commander": because of "the characteristics of that activity, the Court does not deem it appropriate to establish a compensation regarding the income of the



compensate Harbury's ceaseless efforts to determine Bámaca's whereabouts.<sup>279</sup> Non-pecuniary damages were also substantial. The Court granted \$100,000 for Bámaca's suffering, \$80,000 for Harbury's ordeal, and lesser amounts to other family members.<sup>280</sup>

The central objective of Bámaca's family was to locate his remains and conduct Mayan funeral ceremonies, but these attempts had been met with fierce resistance.<sup>281</sup> As a result, the Court directed Guatemala to "provide the necessary conditions not only to determine the whereabouts of the victim, but also to take those remains to the place chosen by his next of kin, at no cost to them."<sup>282</sup> In doing so, the Court stressed, "for the Mayan culture, [and the] Mam ethnic group, funeral ceremonies ensure the possibility of the generations of the living, the deceased person, and the deceased ancestors meeting anew."<sup>283</sup> Sadly, as of this writing, and over ten years after the reparations judgment, Bámaca's remains still have not been recovered.<sup>284</sup>

The Court also mandated "a national exhumations program," which Guatemala had demonstrated willingness to implement.<sup>285</sup> Another vague order required that the State "adopt the legislative and any other measures required to adapt the Guatemalan legal system to international human rights norms and humanitarian law."<sup>286</sup> Finally, Guatemala had to conduct a criminal investigation, publish excerpts of the Court's judgment, and publicly recognize its responsibility for the facts.<sup>287</sup>

In *Escué-Zapata v. Colombia*, the Court considered the detention and prompt execution by the Colombian Army of Germán Escué-Zapata, an indigenous leader from the Nasa community.<sup>288</sup> After assessing the State's

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victim during that period." *Id.* ¶ 51.

279. *Id.* ¶ 55 (granting a total of \$125,000 to Ms. Harbury for pecuniary damages).

280. *Id.* ¶ 66.

281. *Id.* ¶ 69.

282. *Id.* ¶ 82.

283. *Id.* ¶ 81; *see also id.* ¶ 2 (García-Ramírez, J., concurring) (stating that "the judgment has taken into consideration, on the one hand, the right of the next of kin of a person who has died to receive his mortal remains, independently of any ethnic, religious, cultural consideration of a particular case. This is a universal, constant right. On the other hand, this same judgment . . . has considered the specific relevance that receiving, honoring and adequately burying these remains has for the Mayan culture, the Mam group, to which the victim and his next of kin belonged. There is no conflict between these rights . . .").

284. *Bámaca-Velásquez v. Guatemala*, Monitoring Compliance with Judgment, Order of the Court, Inter-Am. Ct. H.R. (Nov. 18, 2010).

285. *Bámaca Velásquez*, Inter-Am. Ct. H.R. (ser. C) No. 91, ¶ 83.

286. *Id.* ¶ 85.

287. *Id.* ¶¶ 78–84.

288. *Escué-Zapata v. Colombia*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R.

acknowledgment of responsibility, the Court established violations of the rights to life, humane treatment, personal liberty, and the “inviolability of private residence,” among others.<sup>289</sup> It then granted lost wages in equity, and compensated various expenses of family members.<sup>290</sup>

With respect to moral damages, the Court set \$50,000 as compensation for Escué-Zapata’s suffering.<sup>291</sup> Lesser amounts were ordered for family members.<sup>292</sup> Notably, the Court took into account that his relatives waited four years “until the State delivered [Escué-Zapata’s] mortal remains,” leading to severe “moral and spiritual repercussions” for the Nasa culture.<sup>293</sup>

Some of the judgment’s non-monetary measures were unexpected. Consistent with Court case law, the petitioners had requested a monument to commemorate Escué-Zapata’s life.<sup>294</sup> Instead, the Court required Colombia to establish a \$40,000 fund under Escué-Zapata’s name “so that the Community can invest it in collective interests, service or works for its own benefit, in accordance with [its] . . . decisions, usages, customs and traditions.”<sup>295</sup> Escué-Zapata was the judgment’s principal victim—not his entire indigenous community, not even several members of the community.<sup>296</sup> Under these circumstances, an order for a communal fund appears unprecedented in the Court’s jurisprudence.

Previously, the Court had ordered scholarships for the children of victims.<sup>297</sup> In addition to providing full expenses for Escué-Zapata’s daughter’s university education (tuition, materials, room and board), the Court added a creative new element: that the State cover all transportation costs for visits to her community so that she can maintain her familial and cultural ties while studying.<sup>298</sup> Also of interest, the petitioners had requested the establishment of a university chair in honor of Escué-Zapata;

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(ser. C) No. 165, ¶ 38 (July 4, 2007).

289. *Id.* ¶ 196.

290. *Id.* ¶¶ 143–145.

291. *Id.* ¶ 156.

292. *Id.* ¶ 155.

293. *Id.* ¶ 153.

294. *Id.* ¶ 167.

295. *Id.* ¶ 168.

296. *Id.* ¶ 131 (“the members of the Indigenous Community . . . will not be considered ‘injured part[ies]’ under the terms of Article 63(1) of the Convention.”). On the other hand, some of Mr. Escué-Zapata’s family members were deemed victims of personal integrity violations. *Id.* ¶ 196.

297. *See, e.g.,* Cantoral-Huamani v. Peru, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 167, ¶ 194 (July 10, 2007); Gómez-Palomino v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 136, ¶ 146 (Nov. 22, 2005).

298. Escué-Zapata v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 165, ¶ 170 (July 4, 2007).

the State accepted the proposal during proceedings before the Court.<sup>299</sup> Furthermore, the judgment called for more typical remedies, such as a criminal investigation, medical and psychological treatment for Escué-Zapata's family members—"taking into account" their "customs and traditions"—and the judgment's publication in Spanish and Nasa Yute.<sup>300</sup> Colombia was also required to publicly recognize liability through an event with community leaders in both Spanish and Nasa Yute.<sup>301</sup>

Florencio Chitay-Nech, the mayor of San Martín Jilotepeque, was another Mayan victim of the Guatemalan internal conflict.<sup>302</sup> During proceedings before the Court for *Chitay-Nech v. Guatemala*, the State accepted legal responsibility for his forced disappearance.<sup>303</sup> After evaluating the record, the Court affirmed violations of his rights to personal liberty, personal integrity, life, juridical personality, and participation in government.<sup>304</sup>

Unlike many indigenous victims before the Court, Chitay-Nech had a substantial and well-documented income as a public official, permitting an order for \$75,000 in lost wages.<sup>305</sup> His family was also compensated for some expenses, but received far less than what they requested.<sup>306</sup> "In attention to the compensation ordered by the Court in other cases of forced disappearances" and the acute suffering of Chitay-Nech, the judgment required \$80,000 in moral damages.<sup>307</sup> The Court also ordered significant amounts—between \$40–50,000—for his children, finding that they had suffered constant persecution, displacement, and "denial of justice."<sup>308</sup>

The Court took a more conservative approach to equitable remedies than it had in *Escué-Zapata*, rejecting petitioners' requests for memorial scholarships and a local museum.<sup>309</sup> Instead, the Court issued a modest order to install a "commemorative plaque" in a "public place significant to the next of kin."<sup>310</sup> Moreover, because the victim's remains still had not

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299. *Id.* ¶ 178.

300. *Id.* ¶ 172.

301. *Id.*

302. *Chitay-Nech v. Guatemala*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 212, ¶¶ 74–77 (May 25, 2010).

303. *Id.* ¶¶ 13–21.

304. *Id.* ¶ 309.

305. *Id.* ¶ 267. Petitioners actually asked for much more, pointing to Mr. Chitay-Nech's increasing earning potential.

306. *Id.* ¶¶ 265–266.

307. *Id.* ¶ 278.

308. *Id.*

309. *Id.* ¶ 249.

310. *Id.* ¶ 251.

been found after nearly three decades, the State was required to locate and return them as soon as possible, in order to permit a burial “in accordance with [Mayan] beliefs and close the mourning process.”<sup>311</sup> Finally, the Court directed Guatemala to continue its criminal investigation, publicly accept responsibility in Spanish and Mayan Kaqchikel, publish the judgment, broadcast it on the radio in both languages, and provide medical and psychological treatment to Chitay-Nech’s children.<sup>312</sup>

In *Tiu-Tojín v. Guatemala*, the State again recognized liability before the Court, this time for the forced disappearances of Maria Tiu-Tojín and her daughter Josefa.<sup>313</sup> In fact, Guatemala had already granted some reparations in response to the Inter-American Commission’s recommendations. Such measures included an apology, a memorial, and compensation for pecuniary and non-pecuniary damages equivalent to \$260,000, distributed to six of the victims’ family members.<sup>314</sup> Despite these remedies, the Court heard the case, convinced by the petitioners that essential problems remained unresolved. Principally, and like many cases before it, the criminal investigation had stagnated and the victims’ remains had not been found.<sup>315</sup>

As a result, the Court set out the case’s facts, well aware of the reparative value of such an authoritative statement, and called for a comprehensive criminal investigation, a search for the victims’ remains, and the judgment’s publication and radio broadcast in Maya K’iché and Spanish.<sup>316</sup> Significantly, the Court concluded that the victims’ next of kin had faced major obstacles in obtaining accountability “due to the fact that they belonged to the Mayan Indian People.”<sup>317</sup> The judgment accordingly directed the State to provide interpreters and other support for their pursuit of justice through the national courts.<sup>318</sup>

Finally, in 2010, the Court issued two judgments against Mexico: *Fernández-Ortega et al.*<sup>319</sup> and *Rosendo-Cantú*.<sup>320</sup> The facts shared many

311. *Id.* ¶ 241.

312. *Id.* ¶¶ 243–256. In these measures, the Court did not make references to the indigenous “worldview” or perspective.

313. *Tiu-Tojín v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 190, ¶ 14 (Nov. 26, 2008).

314. *Id.* ¶ 16.

315. *Id.* ¶ 27.

316. *Id.* ¶¶ 67–120.

317. *Id.* ¶ 97.

318. *Id.* ¶ 100. The Court also granted \$6,000 in future legal expenses toward this end. *See also* discussion *infra* Part III.

319. *Fernández Ortega et al. v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 215 (Aug. 30, 2010).

disturbing details: both cases concerned rapes perpetrated by Mexican soldiers against indigenous women. Petitioners demonstrated, through witness testimony, reports, and expert statements, that heavy military presence in the Mexican state of Guerrero resulted in numerous episodes of violence against indigenous women.<sup>321</sup> After the rapes, the victims and their families endured a protracted denial of criminal justice and reparations. In its judgments, the Court accepted the State's "partial" admission of liability and proceeded to find violations and order remedies.<sup>322</sup>

The decisions required only modest material damages: \$5,500 for lost earnings.<sup>323</sup> As for moral damages, Mexico was instructed to pay Fernández-Ortega \$50,000;<sup>324</sup> Rosendo-Cantú received more, \$60,000, because she was a minor when the rape occurred.<sup>325</sup> Lesser amounts, between \$2,500 and \$10,000, were ordered for family members of both victims.<sup>326</sup>

Non-monetary remedies in both cases reached remarkable levels. The judgments generally resemble each other,<sup>327</sup> but this discussion will focus on *Fernández-Ortega* because it includes slightly more detail. The Court began with its familiar orders for a criminal investigation, legal reform, and publication/broadcast of the judgment in the Spanish and Me'phaa languages.<sup>328</sup> Then, the Court noted an expert witness' statement that a public acceptance of responsibility was particularly important to the community in question. As a result, and fulfilling petitioners' requests, it required that "senior authorities" of state and federal government participate in such an act, along with Fernández-Ortega, her family, and

320. *Rosendo Cantú v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216 (Aug. 31, 2010).

321. *Fernández Ortega et al.*, Inter-Am. Ct. H.R. (ser. C) No. 215, ¶ 79 (describing widespread violence by members of armed forces); *Rosendo Cantú*, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶ 71.

322. *Fernández Ortega et al.*, Inter-Am. Ct. H.R. (ser. C) No. 215, ¶¶ 24, 308 (finding violations to Convention Articles 5, 8, 11, and 25, among others); *Rosendo Cantú*, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶¶ 24, 295 (finding violations to Convention Articles 5, 8, 11, 19, and 25, among others).

323. *Fernández Ortega et al.*, Inter-Am. Ct. H.R. (ser. C) No. 215, ¶ 286; *Rosendo Cantú*, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶ 274.

324. *Fernández Ortega et al.*, Inter-Am. Ct. H.R. (ser. C) No. 215, ¶ 293.

325. *Id.* ¶ 301.

326. *Id.* ¶ 293; *Rosendo Cantú*, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶ 279.

327. Like *Fernández Ortega*, *Rosendo Cantú* required criminal investigation, legal reform, a "public act of acknowledgement of responsibility," publication and radio broadcast of judgment in Spanish and Me'phaa, "a standardized action protocol for the investigation of sexual abuse," human rights training programs, medical and psychological care, and educational scholarships. *Rosendo Cantú*, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶¶ 211–267.

328. *Fernández Ortega et al.*, Inter-Am. Ct. H.R. (ser. C) No. 215, ¶¶ 225–240, 247.

members of her community.<sup>329</sup>

In its orders for medical and psychological care, the Court furnished a great degree of specificity.<sup>330</sup> Several human rights training programs were also required for the military and other state officials.<sup>331</sup> These programs were to “include a gender and ethnicity perspective.”<sup>332</sup>

The Court granted scholarships to Fernández-Ortega’s five children, covering “all the costs of their education until the completion of their higher education, whether of a technical or professional nature.”<sup>333</sup> The judgment also issued a broad order for “the girls of the community of Barranca Tecoani that currently carry out their middle school studies in the city of Ayutla de los Libres, to be provided with housing and a proper diet.”<sup>334</sup> An expert witness had stated that approximately thirty girls faced a dangerous, three-hour commute to school.<sup>335</sup> As a result, many were forced to labor as domestic workers under degrading conditions, so they could stay in Ayutla de los Libres and attend school.<sup>336</sup> The order is extraordinary because these girls were not deemed to be injured parties by the Court; the Court did not expressly find that the State was responsible for having violated their rights.<sup>337</sup>

To conclude, following the petitioners’ requests,<sup>338</sup> the Court ordered more reparations of a “community scope” to “allow the victim to reincorporate herself into her living space and cultural identity” and to help “reestablish the fabric of the community.”<sup>339</sup> The State was directed to create a community center for the promotion of women’s rights. “Under the responsibility and management of the women of the community,” the

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329. *Id.* ¶ 244.

330. *See infra* Part III.

331. *Id.* ¶ 260.

332. *Id.*

333. *Id.* ¶ 264.

334. *Id.* ¶ 270 (“Regardless of the above mentioned, this measure can be complied with by the State if it opts to install a high school in [Barranca Tecoani].”).

335. *Id.* ¶ 268.

336. *Id.*

337. *See id.* ¶ 224 (“In the present case, the victims are Mrs. Fernández Ortega, her husband, Mr. Prisciliano Sierra, and their children, Noemí, Ana Luz, Colosio, Nélida and Neftalí, all bearing the surname of Prisciliano Fernández; accordingly, they will be considered beneficiaries of the reparations ordered by this Court.”).

338. This was their initial request, but the petitioners modified it later. *See id.* ¶ 266 (“The Court notes the change in the request initially made by the representatives that the resources should be handed to OPIM. This revised claim for reparation was not made at the appropriate procedural moment . . . [t]herefore, the Court will not consider it because it is time-barred, but will refer to the initial request submitted by the representatives.”).

339. *Id.* ¶ 267.

center should seek to develop activities “adapted to the indigenous community’s view of the world.”<sup>340</sup> Clearly, petitioners’ efforts to document the systematic violations suffered by Me’phaa women in Guerrero yielded fruit.

### III. EVALUATION OF THE INTER-AMERICAN COURT’S INDIGENOUS REMEDIES

#### A. Introduction

The Inter-American Court, then, has consistently applied to indigenous peoples the contemporary remedies of international human rights law: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. It has fully affirmed that for reparations to pursue the ideal of *restitutio in integrum*, they must incorporate this multidimensional approach. But has the Court done enough to ensure that its reparative model is “effective” for both indigenous individuals and communities?

International law has firmly established that persons belonging to minority groups do not relinquish their individual rights; rather, they also benefit from group protections.<sup>341</sup> As emphasized in the UNDRIP, indigenous peoples have the right to effective remedies for all infringements of collective *and* individual rights.<sup>342</sup> When these rights are not enforced with sufficient remedies, they are diminished, if not disregarded entirely.<sup>343</sup>

Certainly, the Court faces serious constraints in formulating remedies.

340. *Id.*

341. For example, in its general comment on Article 27 of the ICCPR, the Human Rights Committee stated that “this article establishes and recognizes a right which is conferred on individuals belonging to minority groups and *which is distinct from, and additional to*, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant.” U.N. Human Rights Comm., Gen. Comment No. 23(50) art. 27, ¶ 1, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994) (emphasis added); *see also* ILO Convention, *supra* note 2 (referring to individual rights and protections for indigenous peoples).

342. UNDRIP, *supra* note 44, art. 40. Nicola Wenzel explains that “[t]o mark the difference from individual rights . . . most authors concur in defining group rights with reference to the holder of the right. In contrast to individual human rights, the holder of a group right is not the individual but the group itself.” Nicola Wenzel, *Group Rights*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 2 (2011).

343. *See, e.g.*, Levinson, *supra* note 9, at 887 (noting “rights can be effectively enlarged, abridged, or eviscerated by expanding, contracting, or eliminating remedies.”); Fallon, Jr., *supra* note 9, at 685–86 (stating “a right without any remedies would possess dramatically less value than a right that courts will enforce with the full complement of normally available remedies . . . the more extensive and potent the enforcement mechanisms, the more valuable a right becomes.”); HENKIN, *supra* note 9.

After most human rights abuses, the *status quo ante* cannot be restored at all.<sup>344</sup> Moreover, governments—even those who seek to comply fully with the Court’s orders—confront resource limitations, political opposition, and the justified distrust of indigenous peoples. In the face of these challenges, how can reparations be enhanced for indigenous victims? First of all, to improve remedies in general, some guidelines are readily apparent.<sup>345</sup>

Most basically, the Court must strive to calibrate remedies to the rights violated. Reparations must reasonably relate to the kind and degree of harm proven before it. Unlike the approach of the European Court and many domestic tribunals, there cannot be a monolithic response—such as cash compensation—to every rights violation.<sup>346</sup> In this way, society-wide remedies must correlate to proven systematic abuses or flawed legislation, communal remedies to communal rights violations, and individual remedies to individual rights abuses (although there will be mutual reinforcement among these reparations measures). Thus, when a personal measure is sought for an assassinated indigenous leader, a modest payment to his community cannot be the Court’s only response.<sup>347</sup>

Second, all complications emerging from the implementation of remedies cannot be foreseen. Still, before the Court designs reparations and chooses between similar approaches, it must carefully evaluate likely consequences.<sup>348</sup> To do so, the victim’s reality must be closely studied.

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344. See, e.g., John C. Jeffries, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 109 (1999) (commenting that “[in a world of limited resources,] the question will often be not whether we should redress both past and future injuries, but whether we can redress injury at all.”); *Bámaca-Velásquez v. Guatemala*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 91, ¶ 82 (Feb. 22, 2002) (García-Ramírez, concurring) (“When all is said and done, *restitutio* only represents a reference point, an ideal target, in both meanings of the word: an idea and an unattainable goal.”).

345. For additional commentary and critique of the Inter-American Court’s remedies, see Antkowiak, *Remedial Approaches*, *supra* note 39; Thomas M. Antkowiak, *An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice*, 47 STAN. J. INT’L L. 279, 304–316 (2011) [hereinafter Antkowiak, *Emerging Mandate*].

346. This uniform response has been rightly criticized because it fails to differentiate between the rights violated, giving “the same remedial answer to every constitutional question.” John C. Jeffries, *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 262 (2000). Jeffries argues that even U.S. courts, which have a more narrow remedial mandate than the Inter-American Court, should tailor their remedies to the situation—that is, damages should be integrated with the occasional systemic injunction, criminal procedure measures (exclusion of evidence, reversal of convictions), and other applicable forms of redress, such as a court-ordered apology. See *id.* at 262, 281–92.

347. See *Escué-Zapata v. Colombia*, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 165, ¶ 168 (July 4, 2007) (ordering a collective payment when a personal memorial was requested). Still, as noted, collective and individual measures can reinforce each other. See Federico Lenzerini, *Conclusive Notes: Defining Best Practices and Strategies*, in REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 614 (2008) (noting that respecting the collective rights of indigenous peoples promotes their individual rights as well).

348. See James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights*



For example, the Court has recognized some of the sizable obstacles confronted by indigenous and tribal peoples when litigating and claiming reparations. In *Moiwana Village*, it afforded the petitioners “more latitude . . . with respect to acceptable means of proving identity,” because “many Maroons do not possess formal identity documents, and were never inscribed in the national registry.”<sup>349</sup>

However, the Court has also disappointed on this count.<sup>350</sup> Recall its rejection of the Awas Tingni’s reparations brief for arriving twelve days late.<sup>351</sup> At minimum, it should have granted the petitioners’ reasonable request for a subsequent reparations proceeding to present and evaluate evidence, as environmental and cultural impacts are burdensome to prove and require sophisticated assessments. While the Inter-American Commission apparently was also at fault for delays, the Court should have provided ample opportunity for all parties to dispute these topics.<sup>352</sup> This is especially true since *Awas Tingni* was the Court’s very first case concerning ancestral lands and environmental damage. Notably, the Court provided an additional reparations stage in *Salvador-Chiriboga v. Ecuador*, a subsequent case concerning the expropriation and valuation of private

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*Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT’L L. 768, 817 (2008) (“[T]he Court should be less concerned with expanding understandings of human rights than with maximizing the relevance and implementability of its jurisprudence.”).

349. *Moiwana Cmty. v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 178 (June 15, 2005); *see also* *Río Negro Massacre v. Guatemala*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 57 (Sept. 4, 2012) (“The State must establish an appropriate mechanism to ensure that other members of the community of Río Negro may subsequently be considered victims of any of the human rights violations declared in this Judgment, and receive individual and collective reparations such as those ordered in this Judgment . . .”).

350. One of the Court’s mistakes in this area is rather notorious. In *Castro-Castro Prison v. Peru*, it ordered the inscription of the names of accused and convicted terrorists, whose deaths in prison had been attributed to government agents, on a monument called *El Ojo que Llora*. *Miguel Castro-Castro Prison v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160 (Nov. 25, 2006). According to many, the monument had been dedicated to victims of terrorist acts; as a result, the Court’s requirement triggered “enormous political and societal backlash.” Cavallaro & Brewer, *supra* note 348, at 825. Fortunately, the Court revised the order to allow for the commemoration of the *Castro-Castro Prison* victims through other means. *See Miguel Castro-Castro Prison v. Peru*, Interpretation of the Judgment, Inter-Am. Ct. H.R. (ser. C) No. 181, ¶ 57 (Aug. 2, 2008).

351. *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 159 (Aug. 31, 2001).

352. According to James Anaya, who represented the Awas Tingni, the Court only allowed ten days to submit arguments and evidence on reparations, after the merits proceeding. Due to “an internal administrative error, the Commission did not notify [us] . . . until after the deadline had passed.” S. James Anaya & Maia S. Campbell, *Gaining Legal Recognition of Indigenous Land Rights: The Story of the Awas Tingni Case in Nicaragua*, in *HUMAN RIGHTS ADVOCACY STORIES* 117, 141 (Deena R. Hurwitz & Margaret L. Satterthwaite eds., 2009).

land.<sup>353</sup>

Third, and related to the previous points, Court orders should avoid excessive ambiguity, which allows states to substitute more convenient measures or to shirk their duties entirely. In a wide-ranging study on the Court's reparations, numerous victims' advocates stated that its remedial orders could benefit from more specific terms.<sup>354</sup> Greater precision would reduce disputes between victims and state representatives, and expedite the implementation of remedies.<sup>355</sup> It should be noted, however, that elaborate detail from the Court is not always possible. Judges have restricted information before them and limited expertise.<sup>356</sup>

John Braithwaite's restorative justice "keystone" suggests a method of remedial design that will assist courts with these common obstacles.<sup>357</sup> Faced with limitations and difficult choices, tribunals must "empower victims to define the restoration that matters to them."<sup>358</sup> This victim-centered standard implies a multi-step, participatory process. Once a court facilitates the petitioners' full engagement before it, it must listen closely to their preferences and needs, convey them in its remedial orders if violations are found, and then ensure the victims' central role in implementation.

This approach directly addresses the three problem areas sketched above. Placing victims at the center of the process and enhancing information exchange will immerse the Court in their reality, and tailor remedies more precisely to violations. Unsurprisingly, restorative justice has led to high levels of victim satisfaction.<sup>359</sup> The methodology is particularly fitting for indigenous cases, as indigenous cultures founded

353. See *Salvador-Chiriboga v. Ecuador, Reparations and Costs, Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 222 (Mar. 3, 2011).

354. See CARLOS M. BERISTAIN, 2 DIÁLOGOS SOBRE LA REPARACIÓN: EXPERIENCIAS EN EL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS 40 (2008).

355. See *id.* at 40–43.

356. In particularly complex matters, judges may need to limit themselves to the creation of a mechanism or the establishment of objectives for the parties. Here, a helpful approach is suggested by "experimentalist regulation" in U.S. public law litigation. In this model, parties are given discretion to achieve particular goals set by a court. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1017–20 (2004).

357. BRAITHWAITE, *supra* note 10, at 46.

358. *Id.* See also Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT'L & COMP. L. REV. 157, 182, 200 (2004) (noting the limitations faced by courts in situations of mass abuse and emphasizing the need to involve victims in the design of reparations).

359. The victim-driven processes of restorative justice achieve personal engagement, accountability, apologies, and other forms of redress, and have resulted in high levels of satisfaction for participants. See, e.g., John Braithwaite, *A Future Where Punishment is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1744 (1999); Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANNU. REV. LAW SOC. SCI. 161, 175 (2007).

these very principles centuries ago and often practice them today.<sup>360</sup>

Clearly, all victims' demands cannot always be met. However, their priorities must be channeled into reparations that reasonably relate to the proven rights violations.<sup>361</sup> An "appropriate" relationship, already required by the Court, will be demonstrated through the input of victims themselves, of course.<sup>362</sup> Also, other experts, such as anthropologists and environmental specialists, are essential to show judges the specific impacts of violations.<sup>363</sup> This approach, following victims' preferences, will allow for some variance in remedial packages even among cases with similar violations. Such methodology recognizes diversity among communities and individuals,<sup>364</sup> and is entirely feasible for international courts that are not unduly bound by precedent.<sup>365</sup> The remainder of this section will evaluate the Court's indigenous remedies in light of Braithwaite's victim-centered standard and the other basic parameters outlined above, considering both

360. BRAITHWAITE, *supra* note 10, at 5 ("[R]estorative justice has been the dominant model of criminal justice throughout most of human history . . . (among indigenous of Americas, Africa, Asia and the Pacific), restorative traditions have persisted into modern times.")

361. In a previous article, I recommended that the Court adopt a more "participative" approach, whereby it issues a decision on the merits and then obligates the parties to negotiate remedial solutions. With that model, victims would express their priorities during negotiations with states. *See Antkowiak, Remedial Approaches, supra* note 39, at 402–07.

362. *See, e.g.,* Fernández-Ortega et al. v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 215, ¶ 221 (August 30, 2010) ("[T]his Court has established that reparations must be related to the facts of the case, the violations that have been declared, the damage proven, and the measures requested to repair the respective damage. Consequently, the Court must respect all these factors to ensure that its ruling is appropriate and in keeping with the law.")

363. BERISTAIN, *supra* note 354, at 618–19 (stating that expert witnesses have helped the Court's judges understand the nature of violations against indigenous peoples); Nieves Gómez, *Indigenous Peoples and Psychosocial Reparation: The Experience with Latin American Indigenous Communities*, in REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 143–147 (2008) (explaining various psychological and spiritual harms suffered by indigenous peoples at both collective and individual levels); YATAMA v. Nicaragua, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 127, ¶¶ 1–33 (June 23, 2005) (García-Ramírez, J., concurring) (asserting that the Court must examine the historical and cultural context of indigenous peoples to determine the rights violations suffered).

364. *See YATAMA*, Inter-Am. Ct. H.R. (ser. C) No. 127, ¶ 31 (García-Ramírez, J., concurring) ("The fact that the rights are of a universal nature does not mean that the [remedial] measures that should be adopted . . . [must] be uniform, generic, the same, as if there were no differences, distances and contrasts among their possessors.").

365. As Jo Pasqualucci states, "there is no formal rule of *stare decisis* in the Inter-American system, although the Inter-American Court regularly cites to . . . its well-established case law." JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 48 (2d ed. 2013). The Court itself has held that its case law "cannot be invoked as a criterion" to be universally applied; instead each case needs to be examined individually. *Paniagua Morales et al. v. Guatemala*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 76, ¶ 104 (May 25, 2001).

monetary and non-monetary reparations.

#### B. Non-monetary Remedies

One of the Court's defining characteristics is its resolute commitment to non-monetary remedies.<sup>366</sup> Such equitable orders offer many advantages. As opposed to cash compensation, they can target specific violations—for example, by requiring the release of an arbitrarily detained individual.<sup>367</sup> In addition, non-monetary, forward-looking measures can be more efficient and less expensive than lump sum attempts at full economic compensation.<sup>368</sup> In the indigenous context, as reviewed above, these remedies assume varied and demanding forms, such as: cessation of ongoing violations, land restitution, medical and psychological care, apologies, memorials, cultural initiatives, legislative reform, training programs for state officials, and community development schemes. The orders have often responded to the express petitions of individuals and communities. Over the years, these reparations have reinforced that victims most desire the means to restore their dignity, health, and place in society.<sup>369</sup>

For those unaccustomed to the Court's sweeping remedial powers, its orders to reform constitutions or to establish elaborate development programs are surprising. Yet such reparations are consistent with the Court's mandate, as established in the American Convention.<sup>370</sup> Further,

366. Antkowiak, *Remedial Approaches*, *supra* note 39, at 387.

367. Because equitable orders can end ongoing violations, the offender is denied the possibility of paying damages and continuing illegal activity. *See* SHELTON, *supra* note 12, at 45.

368. *See* Jeffries, *supra* note 344, at 109.

369. *See, e.g.*, JUDITH HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR* 1–4 (1997); Roht-Arriaza, *supra* note 358, at 180 (“Over and over again . . . victims ask for official and societal acknowledgment that they were wronged, restoration of their good name, knowledge of who and how it was done, justice and moral reparations.”); ERIC K. YAMAMOTO ET. AL., *RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* 331–342 (2d ed. 2013); Paolo G. Carozza, *Human Dignity and Judicial Interpretation of Human Rights: A Reply*, 19 EUR. J. INT’L L. 931, 936 (2008) (victims of abuse seek defense in the “basic principle of human dignity”); Brandon Hamber, *The Dilemmas of Reparations: In Search of a Process-Driven Approach*, in *OUT OF THE ASHES: REPARATION FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS* 137–141 (K. De Feyter et al. eds., 2005); M. Cherif Bassiouni, *International Recognition of Victims’ Rights*, 6 HUM. RTS. L. REV. 203, 231 (2006); Martien Schotsmans, *Victims’ Expectations, Needs and Perspectives after Gross and Systematic Human Rights Violations*, in *OUT OF THE ASHES* 114–115; MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 106 (1998) (referring to “burning needs for acknowledgement, closure, vindication and connection”).

370. As noted, Article 63(1) of the American Convention provides: “If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right

many remedies have been accepted and implemented by states, albeit slowly, and, in some cases, very reluctantly.<sup>371</sup> Still, like any court of equity, the Court has occasionally fallen short of its significant potential.

The following four sub-sections consider some of the vices and virtues of the Court's main non-monetary remedies for indigenous peoples. Refinements are proposed for the occasional deficiencies noted. Primarily, the Court is encouraged to require more robust victim engagement in the design and implementation of reparations. Yet overall, with respect to its non-monetary remedies, the Court has increasingly focused upon the complex reality of indigenous peoples, and has generally responded to their preferences for restoration.

### 1. Land Restitution

In several cases before the Court, indigenous and tribal communities principally sought to recover or protect their traditional lands. In response, the Court has not only endorsed the communities' rights to their ancestral territories, but it has also required the establishment of domestic laws and procedures to make such rights effective.<sup>372</sup> The Court discourages States from furnishing alternate lands or monetary compensation.<sup>373</sup> In these

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or freedom be remedied and that fair compensation be paid to the injured party." American Convention, *supra* note 11, art. 63(1).

371. See *An Emerging Mandate*, *supra* note 310, at 292–306; Darren Hawkins & Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American Courts for Human Rights*, 24 (Aug. 28–31, 2008), available at <http://www.stevendroper.com/ECHR%20Hawkins%20and%20Jacoby%20APSA%202008.pdf>; Douglas Cassel, *The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights*, in *OUT OF THE ASHES: REPARATION FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS* 214 (K. De Feyter et al. eds., 2005); but see Alexandra Huneeus, *Courts Resisting Courts: Lessons From The Inter-American Court's Struggle To Enforce Human Rights*, 44 CORNELL INT'L L.J. 101, 152–55 (2011) (referring to some national courts as a "vexing source of non-compliance" and urging "partnerships with local justice systems" to expedite the fulfillment of Court remedies).

372. See, e.g., *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 194(c) (Nov. 28, 2007) (ordering that Suriname "remove or amend the legal provisions that impede protection of the right to property of the members of the Saramaka people and adopt, in its domestic legislation, and through prior, effective and fully informed consultations with the Saramaka people, legislative, administrative, and other measures as may be required to recognize, protect, guarantee and give legal effect to the right of the members of the Saramaka people to hold collective title of the territory they have traditionally used and occupied"); Gaetano Pentassuglia, *Towards a Jurisprudential Articulation of Indigenous Land Rights*, 22 EUR. J. INT'L L. 165, 171 (2011) ("[T]he [Court] has converted indigenous property rights into a state's obligation to delimit, demarcate, and title the lands in question, thereby requiring an effective domestic procedure to realize those rights.").

373. See *Xákmok Kásek Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 284 (August 24, 2010) ("Once the Community's traditional territory is fully identified . . . if it is owned by private entities, whether natural or legal persons, the State, though its competent authorities, must decide whether it is possible to expropriate the land for the

cases, the Court recognizes that the ancestral land represents a “perpetual resource” with spiritual, cultural, and economic dimensions that sustain both present and future generations.<sup>374</sup> It acts to safeguard the “all-encompassing relationship” between indigenous peoples and their territories.<sup>375</sup>

In doing so, the Court has not shied from an inevitable clash with colonial and assimilationist policies and laws.<sup>376</sup> The lands may officially belong to the state or private parties; in addition, some of the territories enjoy a wealth of natural resources. A title transfer to indigenous communities could represent a brazen challenge to society’s powerful strata.<sup>377</sup> Beyond the political cost of such decisions, the expropriation of private lands can prove very expensive for states in monetary terms.<sup>378</sup> It is

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indigenous peoples. To decide this question, the State authorities must follow the criteria established in this judgment . . . taking very much into account the special relationship that the indigenous have with their lands for the preservation of their culture and their survival. At no time should the decision of the domestic authorities be based exclusively on the fact that the land is owned privately.”).

374. See BERISTAIN, *supra* note 354, at 591 (explaining that, in these cases, the lands are of major cultural and economic importance to the communities); BARBARA ROSE JOHNSTON & HOLLY M. BARKER, *CONSEQUENTIAL DAMAGES OF NUCLEAR WAR: THE RONGELAP REPORT* 184 (2008) (referring generally to the lasting significance of ancestral lands).

375. *Moiwana Cmty v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 133 (June 15, 2005). In another article, I explored some of the limitations of the Court’s conception of indigenous property. The Court bases many indigenous rights on the concept of land—a framework that requires indigenous peoples to have a particular, and often unrealistic, relationship to their territories. The Court’s approach could ultimately restrict the autonomy of indigenous peoples and their capacity for change. Thomas M. Antkowiak, *Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court*, 35 U. PA. J. INT’L L. 113, 160 (2013) [hereinafter Antkowiak, *Rights, Resources, and Rhetoric*]; see also Engle, *supra* note 44, at 162–182.

376. See Ana Vrdoljak, *Reparations for Cultural Loss*, in *REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 213 (2008) (“In the context of indigenous claims for reparations, restitution is the most unsettling for states because it often involves a direct confrontation with colonial and assimilation policies and practices.”); BERISTAIN, *supra* note 354, at 587–90 (noting the historical context for land distribution and frequent removal of indigenous peoples in several Court cases).

377. See *id.*; JEREMIE GILBERT, *INDIGENOUS PEOPLES’ LAND RIGHTS UNDER INTERNATIONAL LAW: FROM VICTIMS TO ACTORS* 181 (2006) (describing common “patronizing” approaches of states to “protect” such lands by placing them in reserves or in trust—and thus preventing the direct ownership of indigenous peoples). During the Universal Periodic Review procedure before the U.N. Human Rights Council, the Paraguayan delegation stated, “[i]n order to facilitate [compliance with the restitution of lands ordered by the Inter-American Court] it was necessary to reach consensus with various stakeholders within Paraguayan society. The cases were complex and required a high content of mutual understanding and concessions from all parties.” U.N. Human Rights Council, Universal Periodic Review, Paraguay, ¶ 82, A/HRC/17/18 (Mar. 28, 2011).

378. For example, in *Xáknok Kásek*, the Court ordered Paraguay to return 10,700 hectares of land to the community, and a significant part of this territory belonged to private landowners or corresponded to a nature reserve. *Xáknok Kásek Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶¶ 98, 107, 150 (Aug. 24, 2010).

not surprising, then, that processes to return territories have faced major delays in most Court cases.<sup>379</sup> Nevertheless, the Court has generally held firm, requiring restitution, cleanup, and reforestation, as well as pertinent legislative and administrative reforms.<sup>380</sup> In *Xákmok Kásek*, the Court even ordered fines if Paraguay did not return territory to the petitioners within three years.<sup>381</sup>

While these property remedies are pioneering, even courageous, their design can be refined. To begin, the Court should take a more proactive approach to the devastation caused by extraction projects. To help prevent the repetition of these abuses, the Court should place more emphasis on the improvement of states' regulatory frameworks. One possibility is to reaffirm an indigenous community's right to "free, prior, and informed consent" (FPIC) to all such projects.<sup>382</sup> However, in its most recent judgment on the topic, *Sarayaku v. Ecuador*, the Court ignored FPIC, only referring to the weaker right to be *consulted* before potentially-harmful

379. See, e.g., *Sawhoyamaya Indigenous Cmty. v. Paraguay*, Monitoring Compliance with Judgment, Order of the Court, Inter-Am. Ct. H.R., ¶ 10 (May 20, 2009) (observing that the three-year deadline for the land restitution had expired without the State having completed the order); *Yakye Axa Indigenous Cmty. v. Paraguay*, Monitoring Compliance with Judgment, Order of the Court, "Considering," Inter-Am. Ct. H.R., ¶ 11 (Feb. 8, 2008) (noting that "little progress had been made" with respect to the return of lands). However, on June 11, 2014, Paraguay finally passed a law to enable the restitution of the Sawhoyamaya lands. *Ejecutivo promulga restitución de tierras a los Sawhoyamaya*, ULTIMA HORA (June 11, 2014, 9:49 AM), <http://www.ultimahora.com/ejecutivo-promulga-restitucion-tierras-los-sawhoyamaya-n802515.html>. Apparently, then, *Mayagna (Sumo) Awas Tingni v. Nicaragua* is the sole case thus far where land restitution has been fully achieved. *Mayagna (Sumo) Awas Tingni Cmty v. Nicaragua*, Monitoring Compliance with Judgment, Order of the Court, Inter-Am. Ct. H.R. (Apr. 3, 2009).

380. For a distinctive order requiring cleanup and reforestation, see *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter. Am. Ct. H.R. (ser. C) No. 245, ¶ 294 (June 27, 2012). In contrast, the Court has shown caution when considering emergency petitions to protect ancestral lands. *Saramaka People v. Suriname*, Order of the Court, Inter-Am. Ct. H.R. (Sep. 4, 2013) (rejecting Saramaka's request for provisional measures, but requesting "a complete, detailed and specific report on the alleged award of the mining concession on the Saramaka territory"); *Four Ngöbe Indigenous Cmtys. v. Panama*, Order of the Court, 2010 Inter-Am. Ct. H.R. (May 28, 2010), available at <http://www.corteidh.or.cr/index.php/jurisprudencia> (refusing the request for provisional measures to protect ancestral lands from flooding).

381. *Xákmok Kásek Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 288 (Aug. 24, 2010) (holding that "if the three-year deadline in this Judgment expires . . . and the State still has not turned over the traditional land or, as the case may be, the alternative land . . . the State will have to pay the Community [\$10,000] for each month of delay.").

382. The Court has held that, with regard to "large-scale development or investment projects that would have a major impact" within indigenous territory, states have "a duty not only to consult" with the affected community, "but also to obtain [its] free, prior, and informed consent, according to [its] customs and traditions." *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 134 (Nov. 28, 2007).

initiatives.<sup>383</sup>

A state's capacity to redress extensive property harm must also be reinforced. As the U.N. Special Rapporteur for indigenous peoples has observed, states should "adopt regulatory measures for companies . . . that are aimed at . . . sanctioning and remedying violations of the rights of indigenous peoples."<sup>384</sup> For example, when mutually-accepted impact levels are exceeded in extraction projects, government contracts should clearly require companies to halt projects and provide reparations to affected communities, including restoration initiatives. Within specific judgments, the Court can urge such contracts and related measures through its orders to reform legislation and policy.<sup>385</sup> These contracts could make costly environmental restoration and other reparations more feasible for states to ensure.<sup>386</sup> If ultimately funded by a corporation's deeper pockets, such redress will be more likely for indigenous communities.

When requiring restitution or demarcation of land, the Court has at times neglected to account for the porousness of boundaries and the shared use of indigenous lands.<sup>387</sup> Enforcement of some Court orders to strictly delimit borders has aggravated tensions among neighboring communities.<sup>388</sup> *Moiwana* offers a better response to this complex reality.<sup>389</sup> The judgment urged the participation of both the petitioners and neighboring indigenous communities in the border definition process.<sup>390</sup>

383. *Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶¶ 159–220 (June 27, 2012).

384. Special Rapporteur on Indigenous Peoples, *Extractive Industries and Indigenous Peoples*, Human Rights Council, ¶ 48, U.N. Doc. A/HRC/24/41 (July 1, 2013) (by James Anaya).

385. *Saramaka* took a step in the right direction by holding: "[w]ith regards to the concessions already granted within traditional Saramaka territory, the State must review them, in light of the present Judgment and the Court's jurisprudence, in order to evaluate whether a modification of the rights of the concessionaires is necessary in order to preserve the survival of the Saramaka people." *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 194(a).

386. Of course, these contracts must be enforceable, and many powerful multinational corporations will seek to avoid or challenge such agreements and related laws. For example, when El Salvador revoked mining concessions for environmental concerns, the affected corporations aggressively challenged the State before the International Centre for Settlement of Investment Disputes and other bodies. See, e.g., Edgardo Ayala, *Rural Communities Push El Salvador Towards Ban on Mining*, INTER PRESS SERV. NEWS AGENCY, May 29, 2014, available at <http://www.ipsnews.net/2014/05/rural-communities-push-el-salvador-towards-ban-mining> (referring to the lawsuits initiated by two multinational corporations).

387. See, e.g., Dulitzky, *supra* note 120, at 51; BERISTAIN, *supra* note 354, at 612.

388. See, e.g., Dulitzky, *supra* note 120, at 50; BERISTAIN, *supra* note 354, at 625.

389. See, e.g., Dulitzky, *supra* note 120, at 50.

390. *Moiwana Cmty. v. Suriname, Preliminary Objections, Merits, Reparation, and Costs, Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 210 (June 15, 2005). In *Saramaka*, the Court ordered Suriname to delimit and demarcate the territory "without prejudice to other tribal and indigenous communities." *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 194.



In fact, the full engagement of victims—following Braithwaite’s standard—is the only way to avoid a re-victimization of indigenous communities and a retrenchment of inequitable conditions. If demarcation, environmental restoration, and corresponding legislative reform efforts are conducted without the vigorous participation of the affected communities, the “reparations” may result in further harm and subjugation.<sup>391</sup> The mere right to be “consulted” about such efforts, currently emphasized by the Court, does not provide sufficient agency to indigenous peoples and is easily exploited.<sup>392</sup> While commentators have praised the Court for advancing a principle of “effective participation,”<sup>393</sup> it has neglected this principle when favoring consultation over consent, and when designing certain development programs and health care reparations, as discussed below.

## 2. Legal Reform and Training Programs

Indigenous advocates and other experts have underscored that land restitution and related remedies, although fundamental in many cases, are not enough.<sup>394</sup> Many of the disturbing violations addressed by the Court trace their origins to the deep-seated discrimination of indigenous peoples by dominant factions of society.<sup>395</sup> When the Court identifies a discriminatory law or practice, it has occasionally ordered legal and

391. See, e.g., JOHNSTON & BARKER, *supra* note 374, at 225–47 (explaining that, in the Marshall Islands, U.S. remedial efforts—including environmental cleanup and medical treatment—were not only insufficient, in many instances they actually produced further harm); Gómez, *supra* note 363, at 156 (“[T]he execution of reparatory measures must generate processes and spaces for reflection and dialogue for all beneficiaries.”); Hamber, *supra* note 369, at 146 (asserting that the process for delivering reparations is key to their effectiveness); BERISTAIN, *supra* note 354, at 23–26 (underscoring the importance of victim participation in the implementation of remedies); FUNDACIÓN PARA EL DEBIDO PROCESO LEGAL, DESPUÉS DE PROCESOS DE JUSTICIA TRANSICIONAL, ¿CUÁL ES LA SITUACIÓN DE LAS VÍCTIMAS?: LOS CASOS DE CHILE Y GUATEMALA 7 (2008), available at <http://www.dplf.org/es/resources/justicia-transicional-13> (affirming that reparations programs can easily result in re-victimization).

392. The Court’s “right to consultation” is not enough; there are too many opportunities for manipulation by states and corporations, despite its attempts to establish guidelines for the principle. See Antkowiak, *Rights, Resources, and Rhetoric*, *supra* note 375, at 169–70.

393. Gaetano Pentassuglia has praised the Court for incorporating its principle of effective participation “through the whole body of [its] jurisprudence.” Pentassuglia, *supra* note 372, at 177.

394. See, e.g., ENGLE *supra* note 1, at 183–84 (“[L]and alone is insufficient to ensure development . . . efforts to combat racism, guarantee economic compensation, and protect land and heritage thus all play a role” in a broader conception of development); ANAYA, *supra* note 1, at 98 (calling for “remedies that tear at the legacies of empire, discrimination, suppression of democratic participation, and cultural suffocation”); Gómez, *supra* note 363, at 148 (noting that a goal of reparation is “the participation of the victim/survivor in the creation of a country with new ways of seeing and understanding the world based on the value of cultural diversity”).

395. See, e.g., ENGLE *supra* note 1, at 183–84; ANAYA, *supra* note 1, at 98.

administrative reforms, as well as training programs for state officials.<sup>396</sup>

The Court must provide guidance to foster meaningful implementation by unenthusiastic bureaucrats. Such detail will also facilitate the Court's supervision and verification of state compliance. At times, the Court has only offered vague outlines for training programs for state officials.<sup>397</sup> Similarly, for legal reforms the Court may only call on the State to "adapt [its] legal system to international human rights norms," as in *Bámaca-Velásquez*.<sup>398</sup> While this directive may appear far-reaching, in reality such ambiguous language has little chance for enforcement.<sup>399</sup> Ill-defined orders are not really remedies at all; they are readily evaded by states and, as a result, fail to protect and redress corresponding rights.

In contrast with *Bámaca-Velásquez*, the Court provided concrete details in *Fernández-Ortega* and *Rosendo-Cantú*. These judgments urged a "standardized action protocol for the investigation of sexual abuse" for both the State of Guerrero and the federal government "based on the parameters established" in the Istanbul Protocol and World Health Organization guidelines.<sup>400</sup> Both decisions also required "permanent

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396. Many will respond that such efforts are insufficient to transform the societal structures that perpetuate the persecution and oppression of indigenous peoples and other groups. See, e.g., Maria Paula Saffon & Rodrigo Uprimny, *Distributive Justice and the Restitution of Dispossessed Land in Colombia*, in *DISTRIBUTIVE JUSTICE IN TRANSITION* 391 (Morten Bergsmo, et al. eds., 2010) (arguing that many reparations measures "leave untouched many of the conditions of exclusion that are at the basis" of the problem); see also Caroline Bettinger-López, *The Challenge of Domestic Implementation of International Human Rights Law in the Cotton Field Case*, 15 CUNY L. REV. 315, 334 (2012) (indicating that the Court's remedies in the "Cotton Field Case" against Mexico did not fully respond to "the messy reality of a community struggling with an ostensibly unstoppable succession of violent crimes against women").

397. See, e.g., *López-Álvarez v. Honduras*, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 141, ¶ 210 (Feb. 1, 2006) (requiring simply "a training program on human rights for the officers that work in the penitentiary centers"); *Caracazo v. Venezuela*, Reparations and Costs, Judgment Inter-Am. Ct. H.R. (ser. C) No. 95, ¶ 127 (Aug. 29, 2002) (calling for "education and training of all members of its armed forces and its security agencies on principles and provisions of human rights protection and regarding the limits to which the use of weapons by law enforcement officials is subject").

398. *Bámaca-Velásquez v. Guatemala*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 91, ¶ 85 (Feb. 22, 2002); see also *Bulacio v. Argentina*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 162(5) (Sept. 18, 2003) (mandating "such legislative and any other measures as may be necessary to adjust the domestic legal system to international human rights provisions").

399. For example, more than five years after the Court vaguely ordered Guatemala in *Bámaca-Velásquez* to "conform" national laws to international human rights standards, the State still had not provided even minimal information concerning its compliance. *Bámaca-Velásquez v. Guatemala*, Monitoring Compliance with Judgment, Order of the Court, "Considering," Inter-Am. Ct. H.R., ¶8(c) (July 10, 2007), available at [http://www.corteidh.or.cr/docs/supervisiones/bamaca\\_16\\_01\\_08.pdf](http://www.corteidh.or.cr/docs/supervisiones/bamaca_16_01_08.pdf).

400. *Fernández-Ortega et al. v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 215, ¶ 256 (Aug. 30, 2010); *Rosendo-Cantú v. Mexico*,

training programs” on “the diligent investigation of cases of the sexual abuse of women that include a gender and ethnicity perspective.”<sup>401</sup> Mexico was ordered to direct the courses to numerous federal and Guerrero state officials, including prosecutors, judges, police, and healthcare personnel who “constitute the first line of response to women victims of violence.”<sup>402</sup>

*Fernández-Ortega* and *Rosendo-Cantú* certainly placed considerable demands upon the State: law and policy reform, training programs, and several other exacting measures. In fact, the reparations rivaled those of *Río Negro Massacres*, a case that involved five massacres and hundreds of victims. Did the Court overstep its bounds in the Mexican cases? One aspect, mentioned already, was clearly problematic: ordering reparations for several individuals who had not been deemed injured parties before the Court.<sup>403</sup>

However, the number of victims in a case is not the only determinative factor for reparations. If violations have been proven, corresponding remedies must be ordered. In *Fernández-Ortega* and *Rosendo-Cantú*, severe abuses—at both personal and macro levels—were established over the course of the litigation;<sup>404</sup> thus, the Court was obligated to order both individual and collective remedies. Faced with such sprawling demands, however, it will be unrealistic to expect rapid compliance from states—especially for reparations concerning indigenous peoples, who unfortunately often lack the political and economic capital to expedite the measures.<sup>405</sup>

Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶ 242 (Aug. 31, 2010).

401. *Fernández-Ortega et al.*, Inter-Am. Ct. H.R. (ser. C) No. 215, at ¶ 260; *Rosendo-Cantú*, Inter-Am. Ct. H.R. (ser. C) No. 216, at ¶ 246.

402. *Fernández-Ortega et al.*, Inter-Am. Ct. H.R. (ser. C) No. 215 at ¶ 260; *Rosendo-Cantú*, Inter-Am. Ct. H.R. (ser. C) No. 216, at ¶ 246.

403. See *Fernández-Ortega et al.*, Inter-Am. Ct. H.R. (ser. C) No. 215, at ¶¶ 224, 270 (failing to name several individuals as “injured parties,” yet ordering the State to take measures to provide them with housing and proper diet).

404. *Id.* ¶ 79 (presenting the case in the context of “institutional military violence” in the state of Guerrero, where soldiers have committed numerous rights violations against indigenous women); *Rosendo-Cantú*, Inter-Am. Ct. H.R. (ser. C) No. 216, at ¶ 71 (same).

405. See Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Rep. on Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development*, Human Rights Council, ¶ 50, U.N. Doc. A/HRC/12/34 (July 15, 2009) (by James Anaya) (“[I]ndigenous peoples are typically disadvantaged in terms of political influence, financial resources, access to information . . .”); BERISTAIN, *supra* note 354, at 507 (noting the difficulties indigenous peoples will face in obtaining reparations from the state bureaucracy and economically-powerful factions of society); Dinah Shelton, *The Present Value of Past Wrongs*, in REPARATIONS FOR INDIGENOUS PEOPLES 48 (Frederico Lenzerini

While the Court displayed ambition in the Mexican judgments, quite the opposite occurred in *López-Álvarez v. Honduras*.<sup>406</sup> The decision had established numerous abuses, including violations of the rights to equality and freedom of expression because of the Honduran prison's ban on the Garifuna language.<sup>407</sup> López-Álvarez justifiably requested structural remedies to address discrimination in Honduras.<sup>408</sup> The Court responded with an order to improve conditions in the State's detention centers, and mandated a "training program on human rights for the officers that work in the penitentiary centers."<sup>409</sup> Inexplicably, however, the reparations avoided any reference to cultural or ethnic discrimination.

Structural orders, by definition, have the potential to bring about much-needed changes in Latin American societies. In fact, several of the Court's directives have already done so.<sup>410</sup> While a degree of specificity is required, the Court will also do well to leave some flexibility in its orders. All twists and turns in such broad initiatives certainly cannot be anticipated and resolved by a remote tribunal's single judgment. In all cases, however, the Court must demand that victims maintain a meaningful role as these processes unfold. As victims, they must be involved as it impacts their interests and defines the remedies due to them. As often-marginalized indigenous peoples, they may need redoubled governmental efforts to ensure them a voice in the design of new legislation and policy.

### 3. Rehabilitation Programs

Medical and psychological care for indigenous peoples is a formidable undertaking for both the Court and states. In judgments involving multiple petitioners, the Court has ordered medical and psychological treatment through state medical institutions, instead of direct cash disbursements to victims.<sup>411</sup> This is presumably done to reduce costs for defendant states.

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ed., 2008) ("[T]he real cost of full reparations entails loss of not only economic, but social advantages enjoyed by the powerful."); Richard Falk, *The Rights of Peoples (In Particular Indigenous Peoples)*, in *THE RIGHTS OF PEOPLES* 17, 27 (James Crawford ed., 1988) ("[Indigenous peoples] have overwhelming been marginalized as outside the framework of normal political behavior.").

406. See generally *López-Álvarez v. Honduras*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 141 (Feb. 1, 2006).

407. *Id.* ¶ 225(4).

408. *Id.* ¶ 205.

409. *Id.* ¶ 210.

410. Antkowiak, *Emerging Mandate*, *supra* note 345, at 301–02 (describing how states have complied with Court orders for legislative reform and human rights training programs).

411. *Id.* at 296. In some Court judgments, beneficiaries of medical care number into the hundreds. In *Juvenile Reeducation Institute v. Paraguay*, beneficiaries of medical care numbered in the thousands. *Juvenile Reeducation Inst. v. Paraguay*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 112, Appendix I (Sept. 2, 2004).

Yet public medical institutions often lack adequate facilities and training to treat victims of severe human rights abuse.<sup>412</sup> Difficulties are compounded in indigenous cases, where medical personnel struggle to access remote communities and to overcome language and cultural barriers, including unfamiliarity with traditional treatments.<sup>413</sup>

*Plan de Sánchez* made an early and notable attempt in this regard, requiring “a specialized program of psychological and psychiatric treatment” that takes into account “the special circumstances and needs of each person . . . in order to provide collective, family and individual treatment.”<sup>414</sup> The Court even requested the assistance of an experienced Guatemalan NGO, the Community Studies and Psychosocial Action Team.<sup>415</sup> While the novel program was not without its flaws and setbacks,<sup>416</sup> it stands as one of the few health initiatives deemed fulfilled by the Court.<sup>417</sup>

In the Paraguayan trilogy of cases, the Court found precarious health conditions in the makeshift camps. In response, it called for funds to implement various community programs, including health projects, which have not been completed as of this writing.<sup>418</sup> Like other development initiatives, the health projects will be subject to the direction of a three-person committee, which may stifle the voice of the communities. The Court did not expressly require the programs to consider indigenous customs or to obtain their consent, despite petitioners’ requests.<sup>419</sup> In this

412. See BERISTAIN, *supra* note 354, at 245–46.

413. See Gómez, *supra* note 363, at 147.

414. *Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 107 (Nov. 19, 2004).

415. *Id.* ¶ 108.

416. See BERISTAIN, *supra* note 354, at 271–76.

417. Note that several states have complied with orders to provide future medical expenses, but only *Aloeboetoe* and *Plan de Sánchez* appear to have fulfilled their equitable remedies related to healthcare. *Aloeboetoe et al. v. Suriname, Monitoring Compliance with Judgment*, Inter-Am. Ct. H.R. (Feb. 5, 1997); *Plan de Sánchez Massacre v. Guatemala, Monitoring Compliance with Judgment*, Order of the Court, “Declaring,” Inter-Am. Ct. H.R., ¶ 103 (July 1, 2009), available at [http://www.corteidh.or.cr/docs/supervisiones/sanchez\\_01\\_07\\_09\\_ing.pdf](http://www.corteidh.or.cr/docs/supervisiones/sanchez_01_07_09_ing.pdf).

418. In its supervision of these judgments, the Court found that emergency health care was seriously deficient, and the more permanent programs still had not been established. See *Sawhoyamaya Indigenous Cmty. v. Paraguay, Monitoring Compliance with Judgment*, Order of the Court, “Considering,” Inter-Am. Ct. H.R., ¶¶ 35–37 (May 20, 2009), available at [http://www.corteidh.or.cr/docs/supervisiones/sawhoyamaya\\_20\\_05\\_09.pdf](http://www.corteidh.or.cr/docs/supervisiones/sawhoyamaya_20_05_09.pdf); *Yakye Axa Indigenous Cmty. v. Paraguay, Monitoring Compliance with Judgment*, Order of the Court, “Declaring,” Inter-Am. Ct. H.R., ¶ 3 (Feb. 8, 2008), available at [http://www.corteidh.or.cr/docs/supervisiones/yakyeaxa\\_08\\_02\\_08-ing.pdf](http://www.corteidh.or.cr/docs/supervisiones/yakyeaxa_08_02_08-ing.pdf).

419. See, e.g., *Sawhoyamaya Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 201(g) (Mar. 29, 2006) (requesting that all implemented programs “must be previously consented to by the interested parties and must adjust to

way, once health care is finally deployed, it likely will be ill-matched to community needs.

*Fernández-Ortega* and *Rosendo-Cantú* were much more attentive to complexities on the ground. As emphasized by the petitioners, these cases involved indigenous women living in remote areas who had suffered brutal gender violence.<sup>420</sup> The Court demanded that Mexico provide expert medical personnel to care for the victims.<sup>421</sup> In the event that State personnel did not have the requisite expertise, the Court mandated that private specialists be hired.<sup>422</sup> Further, the Court ordered all medical staff to obtain the consent of the victims before treatment by offering “[p]rior, clear, and sufficient information.”<sup>423</sup> The care, including all pertinent medication, was to be provided for as long as necessary in a medical facility located as close as possible to the victims.<sup>424</sup> Mexico was also directed to arrange for transportation and interpreter services, as well as to compensate other costs “related [to treatments] and strictly necessary.”<sup>425</sup>

In *Río Negro*, the most recent judgment on this topic, the victims requested “culturally appropriate” psychological care from the State.<sup>426</sup> Their expert witness had explained aspects of traditional Mayan healing practices during the proceedings. The Court required that the victims and the State together design the precise modalities for the healthcare.<sup>427</sup> Still,

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their customs”). Note that with respect to the orders for “basic services” the Court provided for some consideration of “practices and customs.” *Id.* ¶ 230.

420. See *Fernández Ortega et al. v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 215, ¶¶ 24, 308 (Aug. 30, 2010) (finding violations to Convention articles 5, 11, 8, and 25, among others); *Rosendo Cantú v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶¶ 24, 295 (Aug. 31, 2010) (finding violations to Convention Articles 5, 8, 11, 19, and 25, among others).

421. See *Fernández Ortega et al.*, Inter-Am. Ct. H.R. No. 215, ¶ 252; *Rosendo Cantú*, Inter-Am. Ct. H.R. No. 216, ¶ 253.

422. See *Fernández Ortega et al.*, Inter-Am. Ct. H.R. No. 215, ¶ 252; *Rosendo Cantú*, Inter-Am. Ct. H.R. No. 216, ¶ 253.

423. *Fernández Ortega et al.*, Inter-Am. Ct. H.R. No. 215, ¶ 251; see also *Rosendo Cantú*, Inter-Am. Ct. H.R. No. 216, ¶ 252.

424. See *Fernández Ortega et al.*, Inter-Am. Ct. H.R. No. 215, ¶ 251; *Rosendo Cantú*, Inter-Am. Ct. H.R. No. 216, ¶ 252.

425. *Fernández Ortega et al.*, Inter-Am. Ct. H.R. No. 215, ¶ 251; see also *Rosendo Cantú*, Inter-Am. Ct. H.R. No. 216, ¶ 252.

426. *Río Negro Massacres v. Guatemala*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 286 (Sept. 4, 2012).

427. See *id.* ¶ 289 (“Based on the representatives’ request, this medical and psychological care may be provided by the healers of the Maya Achi community, in keeping with their own health practices and using traditional medicines; accordingly, the State must reach an agreement with the representatives on the way in which this reparation will be executed.”) (footnotes omitted). Nieves Gómez, a psychologist who works with Guatemalan indigenous communities, has noted how “classical medicinal practices” can join with “traditional indigenous” methods. See Gómez, *supra* note 363, at

to do so, the community members will need to overcome wariness of government authorities and other barriers. A better, more focused solution may have directed Guatemala to arrange meetings with specialists chosen by the victims, in order to formulate a treatment plan. In addition, the Court should have instructed the State to ensure that the health personnel, once designated, would have sufficient resources to provide effective and lasting care. In *Plan de Sánchez*, as noted above, community leaders joined with a trusted Guatemalan NGO holding relevant expertise. This ongoing partnership made it easier for victims to eventually obtain the desired health care from the State.<sup>428</sup>

#### 4. Other Forms of Recognition, Restoration, and Accountability<sup>429</sup>

As reviewed above, the Court has frequently responded to indigenous petitioners' demands that states undertake other meaningful actions. These include public apologies and official acceptances of responsibility, offered by high-level officials to community members and transmitted far and wide.<sup>430</sup> Such well-established remedies are complemented by the Court's more recent innovations, such as orders to build a museum or implement programs to promote indigenous cultures, all requested by victims. These reparations can foster respect for indigenous peoples and accentuate the state's responsibility for atrocities. They lift the "veil of denial" over national policies that subjugated and decimated indigenous communities.<sup>431</sup> As long as states ensure that victims or their representatives have leadership roles, these endeavors can lead to the redress and empowerment

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428. See BERISTAIN, *supra* note 354, at 272, 623.

429. As noted in the above review of Court remedies, scholarships have also been frequently ordered; such measures provide a key opportunity for restoration and rehabilitation. See, e.g., *Escué-Zapata v. Colombia*, Merits, Reparations, and Costs, Order of the Court, Inter-Am. Ct. H.R. (ser. C) No. 165, ¶ 170 (July 4, 2007) (ordering full expenses for the victim's daughter's university study, including all transportation costs for visits to her community).

430. On occasion, such statements have been broadcast via radio following petitioners' requests, as radio is a common means of communication among ethnic and indigenous communities appearing before the Court. See, e.g., *YATAMA v. Nicaragua*, Monitoring Compliance with Judgment, Order of the Court, Inter-Am. Ct. H.R., (May 28, 2010), available at [http://www.corteidh.or.cr/docs/supervisiones/yatama\\_28\\_05\\_10\\_ing.pdf](http://www.corteidh.or.cr/docs/supervisiones/yatama_28_05_10_ing.pdf) (confirming that Nicaragua completed broadcasts in at least four locally-spoken languages).

431. See, e.g., PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY* 25 (2001) (referring to the benefits for victims of publicly recognizing the truth about rights violations). For haunting accounts of how indigenous communities were attacked in Guatemala, see *GUATEMALA MEMORY OF SILENCE: REPORT OF THE COMMISSION FOR HISTORICAL CLARIFICATION, CONCLUSIONS AND RECOMMENDATIONS* 17, available at [http://www.aaas.org/sites/default/files/migrate/uploads/mos\\_en.pdf](http://www.aaas.org/sites/default/files/migrate/uploads/mos_en.pdf).

of indigenous peoples.<sup>432</sup>

In several cases, petitioners above all have sought an end to impunity. Only criminal accountability will bring them full satisfaction. For the Court and other legal authorities such as the International Law Commission (ILC), criminal investigations and punishment are not technically reparations; these measures are required by a state's general obligation to respect and ensure human rights, as set out in Article 1(1) of the American Convention.<sup>433</sup> For the varied objectives and benefits of criminal justice, both public and personal, the Court frequently mandates investigation and prosecution.

When requiring criminal accountability, the Court has shown increasing sensitivity to the indigenous context.<sup>434</sup> *Tiu-Tojin v. Guatemala* observed: [I]t is necessary that the States grant . . . effective protection taking into account [indigenous peoples'] specific features, economic and social characteristics, as well as their special situation of vulnerability, their common law, values, uses and customs.<sup>435</sup>

A first step along this path, according to the Court, was that

432. See, e.g., BERISTAIN, *supra* note 354, at 530; Gómez, *supra* note 363, at 148–55; Lenzerini, *supra* note 347, at 616–17. Unfortunately, Ecuador recently attempted a “unilateral” recognition of responsibility, which did not allow for the participation of the Sarayaku, and thus was rejected by the community. See *Estado Ecuatoriano Realiza Acto de Disculpas Públicas Sin Acuerdo de Sarayaku*, CENTER FOR JUSTICE AND INTERNATIONAL LAW (Nov. 25, 2013), available at <https://cejil.org/comunicados/estado-ecuatoriano-realiza-acto-de-disculpas-publicas-sin-acuerdo-de-sarayaku-0>; see also Bettinger-López, *supra* note 396, at 329–30 (describing problems and disappointments associated with Mexico's public event to recognize the violations of the “Cotton Field Case”).

433. See, e.g., Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 166–67, 178–81 (July 29, 1988). Thus, investigation and prosecution are conceptually independent from a state party's duty to redress victims. While the International Law Commission and others share this conceptual view, one cannot deny that the punishment of perpetrators also has a crucial reparative function for the individual victim.

434. See, e.g., Río Negro Massacre v. Guatemala, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 272 (Sept. 4, 2012) (“[I]t is evident that the victims of prolonged impunity will suffer different effects not only of a pecuniary nature owing to the search for justice, but also other sufferings and harm of a psychological and physical nature and on their life project, as well as other possible changes in their social relationships and in their family and community dynamics, particularly in the case of an indigenous community.”) (footnotes omitted). This sensitivity is also demonstrated when the indigenous victim's remains have not been found. See, e.g., Bámaca-Velásquez v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 91, ¶ 82 (Feb. 22, 2002) (ordering the State to find the victim's remains as soon as possible, to facilitate Mayan funeral ceremonies).

435. *Tiu-Tojin v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 190, ¶ 96 (Nov. 26, 2008) (citing *Yakye Axa Indigenous Cmty v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 63 (June 17, 2005); *Sawhoyamaya Indigenous Cmty v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 83 (Mar. 29, 2006); *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 178 (Nov. 28, 2007)).



Guatemala “ensure that [the victims] understand and are understood in the legal proceedings.”<sup>436</sup> Thus, the State needed to provide the victims interpreters and other vital assistance in their ongoing role as civil parties to criminal proceedings. The Court’s attention to reality will support the victims as they face averse local tribunals and prosecutors in their quest for justice.

### C. Monetary Remedies

While the Court’s non-monetary remedies have often responded to the demands and distinctive context of indigenous peoples, a study of its monetary reparations shows troubling results. The abovementioned parameters for remedial design are often disregarded. First, the Court’s compensation orders frequently do not correlate with the kind or degree of violation. For example, an indigenous petitioner may show personalized harm, request individualized compensation, but only benefit from a collective remedy. Or a community may prove significant economic damages, reasonably request market value compensation (after documenting what market value indicates), and only receive a token sum in return. Second, the Court at times does not sufficiently account for the reality of indigenous petitioners, such as the difficulties they face in proving environmental and cultural harm. In short, with respect to monetary damages, the Court overlooks the victim-centered approach, demonstrating a reluctance to evaluate and respond to the claims of indigenous individuals and collectivities.

#### 1. Material Damages

##### a. Cases Involving Indigenous Communities

This section considers material damages ordered for the community itself, and material damages for individuals belonging to the group. In these cases, individual material damages have only been granted *at all* on a few occasions. Starting with *Aloeboetoe*, the Court granted individualized compensation for lost wages and numerous expenses—although the sums were shackled to restrictive trust funds.<sup>437</sup> *Plan de Sánchez* concerned hundreds of survivors, as the actual massacre took place before the State

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436. *Id.* ¶ 100. The Court appears to draw this instruction from the ILO Convention. See ILO Convention, *supra* note 2, art. 12 (providing, in part, “[m]easures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.”).

437. See *Aloeboetoe v. Suriname, Reparations and Costs, Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶¶ 99–102 (Sept. 10, 1993).

had accepted the Court's jurisdiction. To compensate material loss, which the Court characterized as a disruption of "agricultural and employment activities," it presumed damages to consist of \$5,000 per victim.<sup>438</sup> It also acknowledged that Plan de Sánchez residents had lost their homes, and set up a housing program as a "measure of satisfaction seeking to repair the non-pecuniary damage."<sup>439</sup>

In *Moiwana* there was a similar lack of *ratione temporis* jurisdiction over the massacre.<sup>440</sup> As a result, like in *Plan de Sánchez*, the State was able to avoid paying lost wages for the deaths. Still, the Court found that "community members were violently forced from their homes and traditional lands into a situation of ongoing displacement," and suffered "poverty and deprivation since their flight from Moiwana Village, as their ability to practice their customary means of subsistence and livelihood has been drastically limited."<sup>441</sup> Lacking detailed evidence of this material harm, it nevertheless saw fit to presume "on grounds of equity" \$3,000 per survivor.<sup>442</sup> Similar to *Plan de Sánchez*, *Moiwana* also established a separate measure, under non-pecuniary damages, to address the loss of the community members' homes.<sup>443</sup>

Three to five thousand dollars per person may appear negligible for the severe impact, over several years, upon the survivors' livelihood. Still, some tribunals may have thrown out the claims entirely, without a methodical presentation of "convincing" evidence and documentation.<sup>444</sup> The Inter-American Court at least provided some recognition of petitioners' individual requests, which will contribute to a restoration of their dignity.<sup>445</sup> While the litigants in *Plan de Sánchez* were better able to

438. *Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 73–74 (Nov. 19, 2004).

439. *Id.* ¶ 93.

440. *See Moiwana Cmty v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 43 (June 15, 2005).

441. *Id.* ¶ 186.

442. *Id.* ¶ 187.

443. *Id.* ¶ 214. One may ask why material harm such as the destruction of houses was primarily addressed under the heading of moral damages. The Court's approach could be explained by the *ratione temporis* difficulties of the two cases. Arguably, the Court could not directly compensate for one-time property damage that occurred before its jurisdiction was accepted. The broader developmental programs offered a flexible, forward-looking alternative. Such initiatives can help rebuild the community in a deeper sense, attending to aspects of moral harm. In fact, Awas Tingni had already awarded a small development fund under this rationale. *See Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 167 (Aug. 31, 2001).

444. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 912 (1979) (describing the higher level of certainty required in U.S. tort law).

445. *See Jaime E. Malamud-Goti & Lucas Sebastián Grosman, Reparations and Civil Litigation:*

substantiate their material losses, it was also reasonable to presume economic damages after the victims' ordeal in *Moiwana*. In doing so, the Court acknowledged the great difficulty of documenting financial losses when a community—who did not even possess identification papers—was forced to flee and live in exile.

The Court took a step backward in *Río Negro Massacre v. Guatemala*. *Río Negro* also involved massacres occurring before the State's acceptance of the Court's jurisdiction. A significant aspect distinguishes this case, however: the State was held responsible for the forced disappearance of seventeen identified persons. Their remains had not yet been recovered at the time of litigation; legally, then, Guatemala was fully liable for continuing violations of the right to life.<sup>446</sup> Nevertheless, the Court only ordered \$30,000 for material *and* moral damages for each disappeared victim.<sup>447</sup> At a minimum, such an amount might address moral damages according to Court criteria.<sup>448</sup> But it fails to account for lost wages and other expenses, requested by petitioners. Such a low sum is inconsistent with the Court's own admission that the violations "necessarily entail[ed] grave pecuniary consequences."<sup>449</sup>

*Xákmok Kásek* and *Sawhoyamaya* tell nearly the same story. The Court found the State responsible for deaths, and petitioners requested individualized material damages, such as lost wages and other consequential damages.<sup>450</sup> While the Court ordered other forms of compensation, no individual economic damages were granted. It is true that the claims needed more precision and substantiation; however, at least modest damages could have been presumed under the circumstances. The result in *YATAMA* was comparable: individual economic damages were

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*Compensation for Human Rights Violations in Transitional Democracies*, in THE HANDBOOK OF REPARATIONS 539, 554–55 (Pablo de Greiff ed., 2006) (emphasizing the individuality of each victim contributes to the restoration of lost dignity).

446. *Río Negro Massacre v. Guatemala*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 324 (Sept. 4, 2012) (establishing these right-to-life violations, among others).

447. *Id.* ¶ 309.

448. *See infra* Part III(C)(2).

449. *Id.* ¶ 308.

450. *Xákmok Kásek Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶¶ 317–18 (Aug. 24, 2010); Brief of *Xákmok Kásek Cmty.*, Part IV, *Xákmok Kásek Indigenous Cmty. v. Paraguay*, Merits, Reparations, Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214 (Aug. 24, 2010); *Sawhoyamaya Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 201–02 (Mar. 29, 2006); Brief of *Sawhoyamaya Cmty.*, Part IV, *Sawhoyamaya Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006), available at <http://www.corteidh.or.cr/casos.cfm>.

both requested and proven, yet the Court only awarded a collective sum to the organization.<sup>451</sup> There is no guarantee that YATAMA leaders will distribute these funds at all, much less according to the exact damages that each individual incurred.

The Court has also ordered material damages for indigenous communities as a whole. In all three Paraguayan cases, the Court granted “in equity” modest amounts—between five and forty-five thousand dollars—to community leaders as reimbursement for the expenses associated with reclaiming their lands.<sup>452</sup> Yet the Court was also requested to order lost earnings and other damages for the communities *per se*, in order to redress their inability to practice customary economic activities while displaced from their lands.<sup>453</sup> While such claims were sensible, the petitioners offered little to provide a basis for such calculations. The Court refused to consider their invitations to determine compensation “in fairness.”<sup>454</sup>

In *Saramaka*, Suriname had granted logging concessions in the petitioners’ territory. The Court found that “a considerable quantity of valuable timber was extracted” without any compensation, and the community was “left with a legacy of environmental destruction, despoiled subsistence resources, and spiritual and social problems.”<sup>455</sup> In response, the Court ordered Suriname to pay only \$75,000 for the timber taken and related property damage. The judgment added that amount to a \$600,000 community development fund, which it established to redress the “suffering and distress” of the Saramaka community.<sup>456</sup> The Court determined the \$75,000 “based on equitable grounds,” without explaining its calculations further.<sup>457</sup>

The Saramaka community’s expert—a former World Bank Chief Environmental Adviser with thirty-five years of experience assessing

451. *YATAMA v. Nicaragua*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 127, ¶¶ 244–48 (June 23, 2005).

452. See *Xákmok Kásek Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 318; *Sawhoyamaxe Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 218; *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 195 (June 17, 2005).

453. *Xákmok Kásek Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 316; *Yakye Axa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 190–91; Brief of Sawhoyamaxe Cmty., Part IV, *Sawhoyamaxe Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 146.

454. *E.g., Yakye Axa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 190.

455. *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 153 (Nov. 28, 2007).

456. *Id.* ¶¶ 200–01.

457. *Id.* ¶ 199.

environmental and social impacts—had “conservatively” estimated the extracted timber’s market value as over ten million dollars.<sup>458</sup> His conclusions on environmental damages and timber value appear to have gone largely ignored. Despite the Court’s recognition of “environmental destruction” and the petitioners’ calls for market value compensation, the judgment set a very low bar for economic reparation.<sup>459</sup>

In the subsequent case *Sarayaku v. Ecuador*, the petitioners described significant impacts upon the community’s lives and lands, and urged corresponding material damages.<sup>460</sup> The Court replied that evidence lacked specificity, and it is true that petitioners provided few concrete estimates of economic damages.<sup>461</sup> But even government reports had informed of “notable negative impact” caused by the “destruction” of Sarayaku forests.<sup>462</sup> Ultimately, the judgment recognized the following: the Sarayaku’s territory and natural resources were clearly damaged; their economic well-being was “affected by the suspension of production activities” for months at a time; and they incurred various expenses while seeking “the protection of their rights.”<sup>463</sup> However, the Court only awarded the community \$90,000 in material damages.<sup>464</sup>

What could explain such low figures for pecuniary damages? The Court quickly points to the additional development funds, which granted \$600,000 to the Saramaka and \$1.25 million to the Sarayaku. Yet these funds were not presented as material damages, and, in the case of the Saramaka, they came with restrictions as to their use and implementation.<sup>465</sup> In any event, the total monetary damages ordered in each judgment—including the development funds—likely did not remotely approximate what the communities were owed under market value.

International law frequently requires that the amount of compensation should be equivalent to the fair market value of the expropriated property

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458. Affidavit of Dr. Robert Goodland, Expert Witness, ¶ 34 (Apr. 27, 2007), available at <http://www.corteidh.or.cr/casos.cfm>.

459. See *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 153.

460. Sarayaku Community’s Brief containing Pleadings, Motions, and Evidence, 116–132 (copy provided by the Inter-American Court’s Secretariat and on file with author) (requesting eventually that the Court determine monetary damages in equity).

461. Kichwa Indigenous People of Sarayaku, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 315.

462. *Id.* ¶ 313.

463. *Id.* ¶ 316.

464. *Id.* ¶ 317.

465. The community development fund was ordered “to finance educational, housing, agricultural, and health projects, as well as provide electricity and drinking water, if necessary, for the benefit of the Saramaka people.” *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 201 (Nov. 28, 2007).

immediately before the expropriation took place.<sup>466</sup> Moreover, compensation should be “prompt, adequate and effective,” with “prompt” often interpreted as “without delay plus interest until the date of actual payment.”<sup>467</sup> For its part, the Inter-American Court has expressly accepted the Hull formula: “just compensation” must be “prompt, adequate and effective.”<sup>468</sup> However, increasingly influenced by the European Court of Human Rights, it has shown ambivalence toward market value. According to *Salvador-Chiriboga v. Ecuador*, for “adequate” compensation in expropriation matters, states should contemplate the property’s market value, but also provide a “fair balance between the general interest and the [owner’s] interest.”<sup>469</sup> Thus, the Inter-American Court resisted an outright acceptance of market value; nevertheless, it still granted Salvador-Chiriboga \$18.7 million for her land, plus significant interest.<sup>470</sup>

Clearly, market value was more important in the Court’s compensation calculations for Salvador-Chiriboga’s private land than for the Saramaka’s communal territories. There have been attempts to explain away differing compensation schemes for indigenous peoples. For example, owing to their “traditional” and collective “worldview,” monetary compensation and individual reparations are of less interest to them.<sup>471</sup> While this may be accurate in several instances,<sup>472</sup> it is certainly not a universal truth.<sup>473</sup> Realities and preferences must be closely evaluated in every case. The inevitable result of such stereotyping is illustrated by

466. See, e.g., Ursula Kriebaum & August Reinisch, *Right to Property*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 1–29 (2009).

467. *Id.* ¶¶ 29–30.

468. *Salvador-Chiriboga v. Ecuador*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 179, ¶ 96 (Mar. 3, 2011). Since the 1930s the Hull formula has been contested by communist governments and several developing countries. Kriebaum & Reinisch, *supra* note 466, ¶ 24.

469. *Salvador-Chiriboga*, Inter-Am. Ct. H.R. (ser. C) No. 179, ¶¶ 97–98. The Court added that interest should also be paid from the “date that the victim actually lost the right to enjoy possession of the property.” *Id.* ¶ 100.

470. *Id.* ¶ 84. Judge García-Ramírez remarked that “never before” has an Inter-American Court reparations order “come close to that amount even in cases of extrajudicial killings [including massacres].” *Id.* ¶ 19 (García-Ramírez, J., dissenting).

471. See, e.g., Lenzerini, *supra* note 347, at 618 (“Indigenous peoples generally feel that their own values and identity may not be compensated with money, in contrast to the typical Western mentality.”); Vrdoljak, *supra* note 376, at 197, 219–20 (“[T]he intrinsic importance of traditional lands to . . . indigenous communities makes monetary redress, in lieu of restitution, problematic and untenable.”).

472. See, e.g., STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 50 (2012) (explaining that although the Sioux were offered \$100 million by the U.S. government in compensation for the loss of their Black Hills territory, most have refused to accept the compensation because they only want their land back).

473. Beristain notes that Guatemalan indigenous victims have desired individual monetary payments. BERISTAIN, *supra* note 354.

*Salvador-Chiriboga*: private landowners obtain millions, while indigenous peoples receive condescending gestures of charity in the form of developmental programs.

Even if the takings in *Saramaka* and *Sarayaku* were lawful, these communities deserved far greater material damages.<sup>474</sup> The Inter-American Commission has stated that compensation must be “at least equivalent to that which any [non-indigenous] landowner with full legal title to the land would be entitled in the case of commercial development”—to do otherwise would be discriminatory.<sup>475</sup> In fact, total monetary compensation could even be higher in the case of indigenous and tribal peoples, due to the distinctive value of their lands and resources. They do not merely represent a home or an investment, but rather, in many cases, provide generations with spiritual, cultural, and economic sustenance. In this context, then, some commentators and courts have called for a “cultural value premium” over market value.<sup>476</sup>

#### b. Benefit Sharing

One promising aspect to the Inter-American jurisprudence in this area concerns benefit sharing. In *Saramaka*, the Court held that commercial projects must share a “reasonable benefit” with the affected indigenous community.<sup>477</sup> It considered that the benefits concept is “inherent to the right of compensation” recognized in the American Convention’s right to property.<sup>478</sup> Article 21 requires “just compensation,” along with other conditions, upon deprivation of property.<sup>479</sup> Moreover, following

474. See Ingrid Marboe, *Compensation and Damages in International Law: The Limits of “Fair Market Value”*, 7 J. WORLD INV. & TRADE 723 (2006) (explaining that illegal takings require market value compensation at the very least).

475. Inter-Am. Comm’n on Human Rights, *Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II. Doc. 56/09, ¶ 391 (2009), available at <http://www.oas.org/en/iachr/reports/thematic.asp>.

476. Gunther Handl, *Indigenous Peoples’ Subsistence Lifestyle as an Environmental Valuation Problem*, in ENVIRONMENTAL DAMAGE IN INTERNATIONAL AND COMPARATIVE LAW: PROBLEMS OF DEFINITION AND VALUATION 105 (Michael Bowman & Alan Boyle eds., 2002).

477. *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 129 (Nov. 28, 2007). In the subsequent case *Sarayaku*, “reasonable benefits” were not further explained. The oil company had gone bankrupt in the exploration phase and, according to the judgment, no “specific” claims were made on this point. *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter. Am. Ct. H.R. (ser. C) No. 245, ¶ 158 (June 27, 2012).

478. *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 138.

479. Article 21 of the American Convention on Human Rights establishes: “1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just

*Saramaka*, a complete deprivation is not necessary to obtain benefits.<sup>480</sup>

Global experience shows that benefit sharing has most commonly taken the form of a one-time payment before operations begin.<sup>481</sup> Nevertheless, it is likely more beneficial and lucrative to secure a reasonable percentage of profits to empower indigenous communities for both the present and future.<sup>482</sup> If desired by the affected communities, the Court should encourage these enduring agreements, which should be subject to periodic review as long as the project continues in order to maintain fair terms.<sup>483</sup>

However, to establish indigenous property interests, and thus to activate benefit sharing and compensation, the Court looks to see whether the resources in question have been “traditionally” used by the community. To illustrate, the Court considered whether the *Saramaka* should have a property interest in the gold found in their territory:

[The community has] not traditionally used gold as part of their cultural identity or economic system. Despite possible individual exceptions, members of the *Saramaka* people do not identify themselves with gold nor have they demonstrated a particular relationship with this natural resource, other than claiming a general right to “own everything, from the very top of the trees to the very deepest place that you could go under the ground.”<sup>484</sup>

Still, the *Saramaka* Court recognized that gold mining “will necessarily affect other natural resources necessary for the survival of the *Saramakas*, such as waterways.”<sup>485</sup> In this way, even the extraction of “non-traditional” resources can require benefits for communities.

compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law.” American Convention, *supra* note 11, art. 21.

480. In establishing this requirement, the *Saramaka* Court cited to the U.N. Committee on the Elimination of Racial Discrimination. *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 140. The Court also highlighted the U.N. Special Rapporteur’s statement that states should secure “mutually-acceptable benefit sharing.” *Id.* These two U.N. authorities had urged benefit sharing in relation to “major” development projects. The *Saramaka* judgment did not add that qualifier.

481. See Permanent Forum on Indigenous Issues, *Report of the International Expert Group Meeting on Extractive Industries, Indigenous Peoples’ Rights and Corporate Social Responsibility*, ¶ 16, U.N. Doc. E/C.19/2009/CRP.8 (May 4, 2009).

482. See *id.* The Pascua Lama mining project, which is located on the border of Chile and Argentina, is currently exploring such an arrangement: sharing a percentage of profits with local indigenous communities. See *Negocios, Pascua Lama Viabiliza Proyecto tras Acuerdo con Comunidades* (May 28, 2014), available at <http://www.latercera.com/noticia/negocios/2014/05/655-579997-9-pascua-lama-viabiliza-proyecto-tras-acuerdo-con-comunidades.shtml>.

483. See Permanent Forum on Indigenous Issues, *supra* note 481, ¶ 60. Contracts should also contemplate dispute resolution, damages, and other potential liabilities. See *id.*

484. *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 155.

485. *Id.*



Of course, petitioners may not be able to demonstrate, to the Court's satisfaction, these problematic and ambiguous standards: that the extraction will impact their "survival," or that the resources in question have been used "traditionally" by their community. If valuable resources, such as certain minerals and oil, have not played a conspicuous role in indigenous customs, communities could be deprived of significant compensation and benefits. Since the landmark *Awás Tingni* judgment, the Court has recognized indigenous peoples as communal property owners. The next, and far more volatile, step must now be taken: when they happen to live upon resource-rich territories, they must receive economic compensation commensurate with such ownership.

c. Cases Involving Single Victims

In most of the indigenous cases involving single victims, the Court's material damages resemble its typical awards for non-indigenous cases, especially with respect to lost wages. This is because many cases concern low-income individuals with little financial documentation. As a result, the Court orders modest sums "determined in equity"; these estimates often use minimum wage as a reference point.<sup>486</sup> Even when more evidence is available, the Court resists current economic methodologies to fully assess the victim's earnings capacity.<sup>487</sup>

In both single-victim and community cases, the Court has had particular difficulty with farmers who offered little documentation of their assets and income. Still, in *Fernández-Ortega* and *Rosendo-Cantú*, it showed more willingness to consider material damages in this scenario. The judgments found that the petitioners were unable to farm owing to several rights violations, and estimated lost earnings "based on the annual value of the harvest produced" from their parcels of land.<sup>488</sup> Unfortunately, however, even this basic approach has not been applied to other indigenous cases. In *Sarayaku*, petitioners provided information about the

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486. See PASQUALUCCI, *supra* note 365, at 230–31. Exceptions arise when victims have readily-verifiable salaries, which allow the Court to grant more substantial lost wages. See, e.g., *Chitay-Nech v. Guatemala*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 212 (May 25, 2010).

487. See, e.g., STAN OWINGS, UNDERSTANDING EARNING CAPACITY ASSESSMENT AND EARNING CAPACITY OPTIONS 69–109 (2009) (reviewing the numerous factors that are currently considered in assessing earnings capacity).

488. *Rosendo-Cantú v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶ 274 (Aug. 31, 2010); *Fernández-Ortega et al. v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 215, ¶ 288 (Aug. 30, 2010); see also *Cabrera-García et al. v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶ 253 (Nov. 26, 2010) (taking a similar approach).

community's production of yuca and its approximate value; yet there is little indication that these data points were seriously considered by the Court.<sup>489</sup>

#### d. Conclusion

Without a doubt, indigenous community cases can be extremely difficult and expensive to litigate. These are not just cases about collective rights; as discussed, they can feature the individual claims of numerous community members as well.<sup>490</sup> With respect to reparations, petitioners may need to prove a range of elements: the precise location of territories and natural resources, as well as their "traditional use"; any impacts on such lands/resources and corresponding market value; the identification of possibly hundreds of victims and their next of kin; various physical, psychological, and cultural harms; individual and communal lost earnings and other consequential damages, among many other items.<sup>491</sup>

The Court's approach to material damages should better account for the complexity of these cases, and the many additional obstacles faced by indigenous petitioners, such as discrimination and socio-cultural barriers. When petitioners indicate that material damages are significant, the Court should facilitate the submission of evidence, and commit to its full analysis. This certainly may require the Court to hold separate hearings on reparations and afford additional time to litigants, especially when they have shown good faith during the process. Of course, the Court refused these requests in *Awás Tingni*. Such opportunities could have delivered considerable monetary reparations to the community, instead of the \$50,000 consolation sum that was ultimately ordered.<sup>492</sup>

Further, the Court should show more willingness to presume material

489. Sarayaku Community's Brief containing Pleadings, Motions, and Evidence, 118 (copy provided by the Inter-American Court's Secretariat and on file with author).

490. In fact, before *Sarayaku v. Ecuador*, the Court had only found violations "to the detriment of the [individual] members" of a community, even if the right to communal property was breached. See *Xákmok Kásek Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 170 (Aug. 24, 2010) (Grossi, J., concurring). In *Sarayaku*, for the first time, the Court held that the indigenous community itself experienced various rights violations. See *Indigenous Community Kichwa of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 341 (June 27, 2012) (declaring the State responsible for violations against the community).

491. Representatives of indigenous communities clearly shoulder key responsibilities here, as they must ensure that individual members communicate their preferences and needs for reparations. There could be disputes among leaders and/or other members of the community; as a result, petitioners could be divided into separate cases.

492. Unsurprisingly, the community's attorneys estimated far higher material damages. *Awás Tingni Community's Reparations Brief*, 9–11 (copy provided by the Inter-American Court's Secretariat and on file with author) (initially estimating material damages at approximately \$750,000).

damages in indigenous group cases.<sup>493</sup> In several of the community cases reviewed above, some form of economic harm—whether individual or collective—was obvious. When damages *are requested* in these instances, the Court must respond, even with modest amounts such as in *Plan de Sánchez* or *Moiwana Village*. The costs of this approach will not be insignificant, and states will resist. Nevertheless, such payments will expressly affirm individual and collective rights.<sup>494</sup> In addition, even a few thousand dollars could make a difference to an impoverished person's quality of life.<sup>495</sup>

As long as material damages are sought for individuals and communities, both indigenous advocates and the Court should conduct more thorough assessments. Both must show a disposition to analyze the intricate economic consequences of rights abuse, a willingness that is often evident in the design of non-monetary remedies. Various economic models are available to assist in the evaluation of damages in the indigenous context.<sup>496</sup>

## 2. Moral Damages

### a. Cases Involving Single Victims

In indigenous cases involving single victims, the Court has granted moral damages that generally follow both the requests of petitioners and

493. The Court appears more willing in smaller cases to presume material damages, often determining lost wages and other consequential damages in equity. *See, e.g.,* Gudiel Álvarez v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 253, ¶ 367 (Nov. 20, 2012) (noting that, while the petitioners did not substantiate consequential damages, such expenses could be presumed and determined in equity as \$10,000); Díaz Peña v. Venezuela, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 244, ¶¶ 160–161 (June 26, 2012) (holding that, while the petitioners did not document medical costs, such expenses could be presumed and determined in equity as \$5,000).

494. Eric Yamamoto and Brian Mackintosh state that individual payments and “economic justice” are “key to a personal and public sense of ‘reconciliation achieved.’” Eric K. Yamamoto & Brian Mackintosh, *Redress and the Salience of Economic Justice*, 4 FORUM ON PUBLIC POLICY: A JOURNAL OF THE OXFORD ROUND TABLE 1, 13 (2010). Even a modest payment could have much significance, based on an understanding that “in our system of justice, when damage occurs money is paid.” Yael Danieli, *Justice and Reparation: Steps in the Process of Healing*, in REINING IN IMPUNITY FOR INTERNATIONAL CRIMES AND SERIOUS VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS 303, 309 (Christopher C. Joyner ed., 1998).

495. *See* BERISTAIN, *supra* note 354, at 166 (“Reparation should always, and without exception, have an economic aspect that helps to rebuild lives and to face the consequences of the violations.”) (translation by author).

496. For example, petitioners and the Court should consult developing models that assess the earnings capacities of farmers and the self-employed. *See generally* Lawrence Spizman & Frederick Floss, *Loss of Self-Employed Earning Capacity*, 12 J. LEGAL ECON. 7 (2002–2003); Ralph J. Brown, *Loss of Earning Capacity in the Case of a Farmer*, LITIG. ECON. DIG., 1995, at 1.

the parameters of comparable, non-indigenous judgments. It is true that *López-Álvarez* should have been provided more than \$15,000 for enduring over six years of inhuman detention conditions, as well as an illegal arrest and discriminatory treatment.<sup>497</sup> But other judgments, such as *Bámaca-Velásquez* and *Chitay-Nech*, have ordered significant moral damages—\$80–100,000—a range that is standard at the Court for torture and forced disappearance.<sup>498</sup> Cases like *Escué Zapata*, *Fernández-Ortega*, and *Rosendo-Cantú* combined reasonable moral damages with non-monetary remedies of an expansive nature, as described above.<sup>499</sup>

#### b. Cases Involving Communities

In indigenous community judgments, moral damages have only rarely been granted to specific individuals. In *Plan de Sánchez*, the Court granted \$20,000 to each of the 317 survivors.<sup>500</sup> *Moiwana* called for \$10,000 per survivor for moral damages.<sup>501</sup> In *Sawhoyamaxa*, the Court ordered \$20,000 for each of the seventeen community members whose death was attributed to the State.<sup>502</sup> Combining moral and material damages, *Rio Negro* required \$30,000 for each victim of forced disappearance and lesser amounts for other victims.<sup>503</sup> However, indigenous petitioners have also unsuccessfully requested individualized payments for moral damages.<sup>504</sup>

497. Petitioner initially requested \$50,000 for his moral damages. *López-Álvarez v. Honduras*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 141, ¶ 197 (Feb. 1, 2006); cf. *Díaz Peña*, Inter-Am. Ct. H.R. (ser. C) No. 244, ¶ 165 (providing only \$10,000 for over six years of “preventive detention in deficient conditions”); *García-Asto et al. v. Peru*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 137 (Nov. 25, 2005) (granting \$40,000 to each victim, but they were detained longer: nine and fourteen years, respectively).

498. The amounts directly fulfilled the petitioners’ requests. *Chitay-Nech v. Guatemala*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 212, ¶ 274 (May 25, 2010) (requesting \$80,000); *Bámaca-Velásquez v. Guatemala*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 91, ¶ 57 (Feb. 22, 2002) (requesting \$100,000).

499. While \$50,000 may seem paltry as compensation for an extrajudicial execution, the Court granted comparable amounts in similar contemporaneous cases. See, e.g., *Cantoral-Huamani et al. v. Peru*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 167 (July 10, 2007) (granting \$50,000 to each victim); *Zambrano Vélez et al. v. Ecuador*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 166 (July 4, 2007) (granting \$50,000 to each victim).

500. *Plan de Sánchez Massacre v. Guatemala*, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶¶ 88–89 (Nov. 19, 2004).

501. *Moiwana Cmty. v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 196 (June 15, 2005).

502. *Sawhoyamaxa Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 226 (Mar. 29, 2006).

503. *Rio Negro Massacre v. Guatemala*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 309 (Sept. 4, 2012).

504. For example, in *Sawhoyamaxa*, the Court found the State responsible for 17 deaths. Yet it did

Despite victims having demonstrated individual violations (such as acute personal suffering), apart from those violations associated with their community membership, moral compensation was denied.

While these results are certainly disappointing, it is difficult to conclude that significant differences exist between indigenous and non-indigenous judgments.<sup>505</sup> This is because, in cases with numerous petitioners, the Court generally appears to make economic reparations more feasible for defendant states, often granting victims lower moral damages than what they would receive in smaller cases for similar violations.<sup>506</sup> There have also been non-indigenous group judgments where victims have requested and proven individual moral damages, but did not receive any payment at all.<sup>507</sup>

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not award the identified family members moral damages for their own suffering, despite their requests and the Court's frequent presumptions in this regard. Sawhoyamaxa Community's Brief containing Pleadings, Motions, and Evidence, 34, *available at* <http://www.corteidh.or.cr/casos.cfm>. The Court only compensated the moral harm of the deceased. *Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 226. In *Xákmok Kásek*, petitioners also requested individual compensation for the family members of the deceased. These payments were to address both the moral harm of the deceased, as well as the suffering of the family members themselves. *Xákmok Kásek Community's Brief* containing Pleadings, Motions, and Evidence, 47–48 (copy provided by the Inter-American Court's Secretariat and on file with author). Instead, the Court awarded a sum to the community's leaders, to distribute "as they see fit." *Xákmok Kásek Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 325 (Aug. 24, 2010). While their compensation was not fully prevented here, it certainly is not assured.

505. See, e.g., *Massacres of El Mozote v. El Salvador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 384 (Oct. 25, 2012) (granting \$35,000 for pecuniary and non-pecuniary damages to each executed victim). Nevertheless, a troubling disparity appeared in two recent Court judgments against the same State. The Court in *Gudiel Álvarez v. Guatemala*, a case that did not prominently involve indigenous peoples, granted \$80,000 in moral damages to each of the estates of 26 victims of forced disappearance. *Gudiel Álvarez v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 253, ¶ 371 (Nov. 20, 2012). In contrast, *Río Negro*, as noted above, ordered only \$30,000 for each of 17 victims of the same violation. *Río Negro Massacre v. Guatemala*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 309 (Sept. 4, 2012). Some will defend the gap by noting that *Río Negro* involved many more total victims—382 survivors receiving compensation—and also required expansive community measures requested by petitioners. Still, the difference is too stark and sends a discriminatory message to *Río Negro* victims—even to those who may have preferred the higher proportion of non-monetary remedies.

506. See Antkowiak, *Remedial Approaches*, *supra* note 39, at 396; see also BERISTAIN, *supra* note 354, at 178 (quoting a current Inter-American Court Judge, who states, "[i]f you have to compensate three hundred people, you have to think realistically about a compensation of millions for the State, which possibly will not comply. So you need to find in equity an amount that helps the victim . . . and that doesn't make the State react negatively.") (translation by author).

507. See, e.g., *Ituango Massacres v. Colombia*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, ¶¶ 381, 397 (July 1, 2006) (granting compensation to only certain categories of victims, despite compensation requests for all victims); *Juvenile Reeducation Inst. v. Paraguay*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶¶ 297, 309 (Sept. 2, 2004) (doing the same).

To alleviate the cash shortfall in large cases, the Court often requires substantial non-monetary reparations.<sup>508</sup> There is no doubt that several of these remedies, such as public apologies, offer powerful redress on both collective and individual levels. In fact, “collective” remedies such as health care programs have a clearly individual component. Still, if the Court denies victims their prioritized individual remedies, it will shortchange individual rights.

For now at least, the Court appears to have set its strategy, choosing to mitigate a state’s financial burden in group cases, despite numerous potential objections.<sup>509</sup> Under these circumstances, two imperatives are evident. First, if the Court reduces moral damages, it must do so equitably across indigenous and non-indigenous cases.

Second, as with material damages, the Court must look to the evidence and victims’ preferences when ordering non-pecuniary reparations. When a victim shows moral harm and states that an individual payment is important, some degree of compensation must be provided.<sup>510</sup> In fact, for years the Court has indicated that moral harm should be presumed for serious violations.<sup>511</sup> Yet currently, in indigenous community cases, individual moral damages only seem assured when deaths occur. That approach is insufficient: if the Court does not reasonably respond to the way victims want to be restored, it does not adequately redress them. As a result, it fails its mandate, and critical rights are greatly diminished relative to the right to life.

### c. Community Development Funds

For years now, the Court has established community development funds, ostensibly as a collective remedy for moral damages.<sup>512</sup> Community

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508. Such a distribution of remedies may still prove satisfactory to victims, who often prioritize measures of recognition, restoration and accountability. *See supra* note 369 and accompanying text.

509. As maintained throughout this article, rights are undermined by weak remedies. At the very least, the Court could openly recognize that it is reducing monetary reparations for these pragmatic reasons. As Paul Gewirtz states, “[b]y candidly acknowledging that they are providing something less than a full remedy, courts leave the unfulfilled right as a beacon. This leaves open the possibility that at some point the courts will be able to furnish a more complete remedy.” Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 673 (1983).

510. The sum should never be presented as full compensation for suffering, since in these terms it will certainly disappoint. *See* Pablo de Greiff, *Justice and Reparations*, in THE HANDBOOK OF REPARATIONS 451, 466 (Pablo de Greiff ed., 2006).

511. Citing to various Court judgments, Jo Pasqualucci states, “evidence is not necessary to prove non-pecuniary damages to a person who has been subject to cruel, inhuman, and degrading treatment, extrajudicial execution, forced disappearance, or arbitrary detention.” PASQUALUCCI, *supra* note 365, at 236.

512. This approach began in *Awat Tingni*. Mayagna (Sumo) Awat Tingni Cmty. v. Nicaragua,

leaders have frequently asked for these funds, although often with the key proviso that they be deployed in accordance with their modes of governance and customs.<sup>513</sup> Before *Sarayaku*, nevertheless, the Court placed restrictions upon the funds. To illustrate, *Saramaka* provided that the fund “will serve to finance educational, housing, agricultural, and health projects, as well as provide electricity and drinking water, if necessary, for the benefit of the Saramaka people.”<sup>514</sup> Decisions to use the funds were left to an “implementation committee” composed of one representative appointed by the community, another by the state, and a third jointly named by the community and the government.<sup>515</sup>

As noted above, the Court finally abandoned this approach in *Sarayaku*, granting the community full control over the assets. Such a reform was necessary, because these funds serve as reparations for rights violations. Regardless of how one chooses to conceptualize the programs, as material or moral redress, they cannot come with judicially-imposed constraints. Otherwise, they are just another incarnation of *Aloeboetoe*’s ghost: “reparations” with unjust restrictions for victims.

Defining the funds as moral reparations affords the Court significant flexibility.<sup>516</sup> By not representing the programs as material damages, it need not concern itself with market value and stacks of financial and technical documents. Rather, the Court can control non-pecuniary awards to an extent, as subjective estimates of “pain and suffering.” Standards for moral damages, moreover, are relatively modest in the Court’s case law, as reviewed above. In this way, a non-pecuniary framework allows the Court to avoid multi-million dollar judgments like *Salvador-Chiriboga*. The development funds are just large enough to distract from the meager orders for material damages. Not surprisingly, states, which already owe the communities some level of social investment<sup>517</sup> and face far more costly

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Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 167 (Aug. 31, 2001). In *Saramaka*, the fund was to redress the “denigration of their basic cultural and spiritual values” and “alterations to the very fabric of their society.” *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 200 (Nov. 28, 2007).

513. See, e.g., *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 192 (Nov. 28, 2007) (explaining that representatives of the community requested that awards all be “determined and implemented with the informed participation and consent of the Saramaka people.”).

514. *Id.* ¶ 201.

515. *Id.* ¶ 202. As reviewed above, this committee follows other judgments. See, e.g., *Moiwana Cmty. v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 215 (June 15, 2005); *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 206 (June 17, 2005).

516. As already noted with respect to *ratione temporis* issues. See *supra* note 443 and accompanying text.

517. However, as the Inter-American Commission states, reparations “must not be confused with

alternatives, have not vehemently objected to the Court's approach.<sup>518</sup>

As a consequence, the Court's historic affirmation of indigenous peoples as communal property owners is compromised. Rather than receive their due for lost, damaged, or co-opted property, they receive a non-threatening fund to redress moral harm—when they have actually suffered from both moral and material perspectives. The Court's reluctance to closely evaluate damages and order substantial monetary compensation recalls one enduring viewpoint on indigenous peoples: they should be “assisted” primarily because they represent an important part of society's diversity. According to this flawed view, “cultural survival” is permissible, but economic power is not—because a “rich Indian” represents “a signal of corruption, cultural loss, or values gone awry.”<sup>519</sup>

#### IV. CONCLUSION

In many respects, the Inter-American Court has led a global movement for the recognition and redress of indigenous rights. However, the above examination of monetary reparations has shown disquieting results, particularly in the group cases. In these community cases, the Court does not always respond to substantiated claims for damages by individuals and groups. When it neglects the well-founded requests of individual petitioners for material or moral damages, it sacrifices their individual rights to collective concerns. Yet the Court also undermines collective rights, such as the communal right to ancestral property, when it

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the provision of basic social services that the State is bound to provide in any case by virtue of its obligations in the field of economic, social and cultural rights.” Inter-American Commission on Human Rights, *supra* note 478, at ¶ 243; *see also* Roht-Arriaza, *supra* note 358, at 188 (“Human rights groups have objected to this conflation of obligations as an abdication of the state's legal obligation to respond to past injustices.”).

518. Some commentators have suggested that the Court's development programs may go too far, because they attend to social, economic and cultural rights. *See generally* Iris T. Figueroa, *Remedies without Rights?: Reparations and ESC Rights in the Inter-American System* (May 2010) (unpublished student note), available at [http://works.bepress.com/iris\\_figueroa/1](http://works.bepress.com/iris_figueroa/1). It is true that the American Convention's text offers limited provisions on social, economic and cultural rights. Still, the Court's expansive interpretation of the right to life as the right to a “dignified life” (*vida digna*) addresses this issue. Indigenous judgments and other decisions have established that the right to life entails certain key cultural, social and economic protections. *See, e.g.*, *Xákmok Kásek Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 217 (Aug. 24, 2010); *Yakye Axa Indigenous Cmty., Inter-Am. Ct. H.R. (ser. C) No. 125*, ¶ 167 (June 17, 2005). At a minimum, then, the Court should require sociocultural remedies when *vida digna* is neglected.

519. ENGLE, *supra* note 1, at 212 (quoting JESSICA CATTELINO, *HIGH STAKES: FLORIDA SEMINOLE GAMING AND SOVEREIGNTY* (2008)); *see also* Permanent Forum on Indigenous Issues, *Rep. of the International Expert Group Meeting on Extractive Industries, Indigenous Peoples' Rights and Corporate Social Responsibility*, U.N. Doc. E/C.19/2009/CRP.8, ¶ 14 (May 4, 2009) (“Participants expressed frustration that extractive industries often treated benefit-sharing or social programs as charity, rather than a human rights issue”).



evades proven claims for compensation.

The full restoration of victims is often out of reach, especially in large group cases. In such circumstances, their priorities and needs, supported with evidence, must direct a tribunal's difficult choices. With its non-monetary remedies, the Court has pioneered a victim-centered approach by directly responding to indigenous petitioners. Nevertheless, their redress and empowerment will be critically limited if the Court restricts monetary reparations for individuals and collectivities.